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AUTHOR Jensen, Donald N.
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ABSTRACT

The trend toward policymaking by the courts is reviewed, and the following four issues are considered: (1) the direct and indirect impact of court intervention on social policy outcomes; (2) the effect of that intervention on the process of policymaking; (3) the extent to which court intervention has shaped the politics policymaking in a particular issue area; and (4) the issues, priorities, political environment and organizational setting that determine court impact. A comparative study is made of two issue areas that typify judicially mandated reform--prisons and special education. Distinctions between the two settings--school systems and penal institutions--are noted for organizational structure and operations, stated and operational goals, and the relevance of professionalism. The emergence of public law litigation and the effects of judicial attempts to reform public institutions are briefly considered, followed by detailed analysis of four decisions (Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania, Jose P. v. Ambach, Rhem v. Malcolm, and Palmigiano v. Garrahy). Four major determinants of the impact of institutional reform litigation are identified: issue, organizational setting, professionalism, and environmental factors. A final chapter summarizes the evolution of the court's role in each of the four cases and suggests that the courts may behave much like the unaccountable bureaucracies they are called upon to reform. (CL)

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PURSE, SWORD, AND JUDGMENT:

THE IMPACT OF COURT INTERVENTION ON SOCIAL POLICY

Donald N. Jensen
Stanford University

August 1984

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PURSE, SWORD, AND JUDGMENT

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"...the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them....The judiciary...has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

Alexander Hamilton
The Federalist, Number 78.

"Litigation is as American as Apple Pie."
Peter Roos
Mexican-American Legal Defense and Educational Fund

CHAPTER 1: INTRODUCTION: THE JUDICIAL ACTIVISM DEBATE

Americans are litigation crazed. In simpler times, most people settled their grievances by telling each other off or punching a nose or two. But if you just look at somebody sideways today he might shriek, "You'll hear from my lawyer," and file a million dollar lawsuit....

During the last three years, more than 1,500 suits have been filed by Illinois prison inmates, alleging various violations of their civil rights....

An inmate sued because the porcelain toilet seat in his cell had been replaced by a stainless-steel toilet seat. He said the change in seats caused him to develop hemorrhoids and he sought damages....

Most of the cases are thrown out at preliminary hearings. But the cost to the state in processing them still adds up about $600,000 a year.

Mike Royko, October 21, 1982

"I understand we're criminals, but we should get better than this."

Fernando Medina, inmate at the Ossining Correctional Facility (now Sing Sing). Ossining, New York, The New York Times, May 15, 1983.

Public policy in this country is regularly made by the courts. Prisons and jails, school systems, juvenile detention facilities, and other institutions are frequently the focus of lawsuits by individuals seeking to improve the services they receive. Judges have been asked to regulate the temperatures of jail cells, the location and size of prisons, staff-inmate ratios, and even the number of cubic feet of air that should move through a given area. In a recent year, almost one-half of the budget of the city of Boston was under the control of federal courts. In that same year judges presided over the spending of more than $500 million by Massachusetts as a result of litigation against that state.

These lawsuits have several common characteristics. They usually focus on distributive and redistributive government policies, casting questions of public policy in the legal rhetoric of rights, remedy and legal obligation. For example, the handicapped claim that they are entitled to a public education. Prisoners assert that their conditions of confinement do not meet constitutional standards. Such lawsuits involve many parties, rather than a single plaintiff and a single defendant, and their impact extends far beyond the immediate parties before the court. The focus of the suit is forward rather than backward, and it aims at remaking the structure of the institution and the services it provides. Remedies in these suits entail complex administrative changes and provisions for service delivery, and they result from bargaining by litigants. The judge often assumes an active role in fact-finding and evaluation in these cases, since the issues in dispute require him to make decisions about the adequacy of services that can only be prudently made if the organizations that provide them are actively monitored. His involvement does not end with the entry of a judgment or settlement, but often extends to the implementation of the decree. Thus, this "type of litigation involves not only the establishment of a right but the judiciary's intervention in the administrative details of institutions in order to implement the enjoyment of that right."[1] This form of judicial action is very different from that described by Alexander Hamilton, who in Federalist No. 78 described the passive judiciary he forsaw. "Judgment" would be the main attribute of the courts in the new nation. They would lack, he said, both force and will.[2]

There are several explanations for this increase in judicial activism. The civil rights movement in race relations and the anti-war movement of the

1960s encouraged citizens to view the courts as an institution sympathetic to social reform. Since the New Deal, many judges themselves have viewed their role in a democratic state as one sensitive to the interests of racial minorities, inmates, and the handicapped. In a society where legislatures and administrative agencies are perceived as cumbersome or, self-serving, courts hold particular attraction for those who seek social change.

In the past decade, this strong judicial activism has evoked criticism both of its legitimacy andf its efficacy.[3] Legitimacy concerns include whether the exercise of administrative powers by the courts is compatible with the constitutional separation of powers, which supposedly places managerial authority in the executive branch of government; whether the existence of a powerful judicial branch violates democratic norms that suggesting that all political institutions ultimately be subject to popular control; whether judicial activism is compatible with federalism, especially the recent court rulings on issues that historically were left to state and local authorities? Other questions concern whether the courts "should strictly limit themselves to deciding cases on the basis of strict 'principles' or should feel free to engage in broader deliberations", by taking policy concerns into account. Questions also have been raised about how well represented are the individuals or social groups for whom lawyers in broad, class-based suits purport to speak.

Capacity questions have criticized the ability of judges to gather and evaluate factual information. Court action in reform suits is compared to the fact-finding capabilities of legislators. Questions are raised about the ability of courts tc adequately implement the remedies they order

through devices such as special master, receiverships, and the contempt power.

One significant problem with these studies is that they focus almost exclusively on the courts. The political and social environment in which a court tries to reform a public institution is rarely investigated.

The impact of court intervention on institutions that usually make and manage social policy has scarcely been examined? What changes might be expected in policy toward the handicapped, for example, once a judge intervenes? Obtaining answers to these questions requires an examination of the influence the political and social environment has on a court's ability to effect change, not just on the institutional aspects of judicial activism.

A third limitation of the extant research is that judicial activism seldom has been examined across differing issue areas. Courts have intervened in many policy areas--educational policy, prison administration, mental health and the like--which differ from one another in significant ways. Some issues have high visibility, while others attract less attention; some public services require the application of sophisticated human technologies in order to improve them, while others rely on simpler approaches. These differences may notably shape what happens when a court intervenes, and may suggest where intervention is most likely to be successful.

To be sure, studies of the impact of court decisions are not new, but they are problematic. Many are concerned with simple compliance or noncompliance with court decrees: whether police departments have followed the rules of criminal procedure outlined by the appellate courts, or whether school districts have obeyed the Supreme Court's decision outlawing

prayer in the public schools. These studies assume that impact is relatively simple to measure, for they imagine that the courts articulate a standard of behavior that existing units of government follow without supervision.

Changing public services through law, however, requires that the behavior of an organization's members be subtly altered, that new technology be adopted, or that new theories of social science be used and incorporated into existing organizational routines. Institutional reform suits may determine the public agenda, or have symbolic impact. Existing studies of court impact do not account for these subtleties.

Most impact studies also fall victim to what Jerome Frank once called the "appellate court myth"--the belief that the critical judicial function takes place at the appellate level, where legal principles can be lifted out of the parochial confines of particular factual disputes and given general applicability. Implicit in this myth is the assumption that [since] "the judicial process, [is] essentially mechanical, there really was no process to study; only the outcome, the decision, the principle of law was important."[4] Thus, the best known impact studies look at the United States Supreme Court and the extent to which public behavior is changed as a result of Supreme Court opinions.

The effect of judicial intervention on institutional reform needs to be examined; and not just immediately after a court decision, the focus of many impact studies, but also over time. Suits that challenge the legal or constitutional sufficiency of public services are often not brought until the plaintiffs have first challenged isolated administrative practices or raised individual rights issues. Prison suits, for example, often begin with efforts

to protect inmate's rights to uncensored mail or their right of access to their attorneys. Only after years have passed and plaintiffs and judges become familiar with the entire institution are suits filed that challenge the entire penal system.

Too frequently institutional reform is viewed from one dimension, through the the prism provided by the focus of the law school casebook on the appellate courts. This emphasis is inappropriate for the study of institutional reform litigation, because it is at the trial court level that most attempts to reform public institutions take place. Little is known of the reasons underlying plaintiff's strategy in these suits. Do plaintiffs go to court because the political process "broke down", preventing a serious hearing from elected officials or administrators? Do they seek judicial help because the legal forum promises a quick and relatively easy way to get what they want?

Research on the related issue of policy implementation has examined how organizations respond to new policy directives and the factors that shape policy outcomes.[5] Specific characteristics of implementation--the importance of clearly communicating directives, the need to provide public bureaucracies with adequate resources, and the capacity of different organizational structures to implement public policies, for example--have been scrutinized. Many studies suggest that implementation of any particular public policy is at best a partial success, and that the process depends on factors well beyond the control of policymakers.

Our study of the prisons and schools weds a concern with implementation to a specific interest in the courts, looking at the impact of judicial

attempts to reform public institutions. Attention is not paid solely to to compliance or noncompliance but with the more indirect changes in social policy that result from the intervention of the courts into the process of decision. The study looks both at the impact of court intervention, and at court intervention as but one strand in a broader tapestry of policy formulation and implementation.

More specifically, the inquiry centers on four issues:

1. The direct and indirect impact of court intervention on social policy outcomes.

2. The effect of that intervention on the process of policymaking--on the internal priorities and structures of the public organizations whose behavior the court seeks to change, and on the extent to which the intended change becomes a permanent part of the public bureaucratic culture.

3. The extent to which court intervention has shape the politics policymaking in a particular issue area.

4. The issues, priorities, political environment and organizational setting that determine court impact.

These questions are taken up in a comparative study of two issue areas that typify judicially mandated reform--prison and jails one the one hand, and special education on the other. The comparative frame makes it possible to anticipate what is likely to happen when a court seeks to make social policy. The different substantive issues, organizational settings, and interest group activities in each issue area will shed light on the underlying question: what difference does a court suit make, and why?

II. Special Education and Penal Institutions: Organizational and Professional Setting

Schools and jail systems perform important social tasks. School districts hire teachers and principals, implement state and federal laws concerning education, enroll students and operate thousands of classes for those students, and engage in a large number of other educational activities. State departments of education set educational standards to be followed in the school districts, provided financial assistance to local school districts, and also addresses scores of other issues.

Jails, which are local penal institutions, provide for the care and custody of persons charged with felonies or other violations of the law who are unable to furnish security to insure their appearance at criminal proceedings. They also serve as places where persons with minor crimes can serve their sentences. City corrections departments manage one or more jails and any other institutions, such as hospital prison wards, that meet the needs of jail inmates. These departments also transport inmates between the jails and the courts, and maintain the buildings under their care. States maintain penal institutions called prisons, which house sentenced offenders (usually those who have committed serious crimes). States also maintain the buildings under their care, and they place certain mentally disturbed individuals in community treatment facilities, where appropriate.

Both school systems and penal systems sometimes are charged by law with working toward certain goals. The constitution of the state of Kansas, for example, requires its legislature to provide for the intellectual, educational, vocational and scientific improvement of its citizens by establishing and maintaining a public school system. Its

Local school boards in Kansas, under the general supervision of the state board of education, [2] set courses of study, adopt teaching standards, and select texts, subject to the approval of the state board.[3] The Rhode Island Department of Corrections has as its responsibility the rehabilitation criminal of offenders as law-abiding and productive members of society. By contrast, many state constitutions provide for a system of public education without defining what "education" means. Similarly, many penal organizations are required to maintain and operate prisons and jails without working to rehabilitate inmates.

The goals of public organizations have several distinguishing characteristics. Many such organizations have no goals at all (What is goal of the Department of State?); have goals that are not attainable (It is impossible to make all criminals "productive" members of society); have goals that are vague (PL 94-142 guarantees every handicapped child in the United States an education that is "appropriate" to his needs); or have goals that are contradictory (A state may not have enough money to simultaneously provide an appropriate education to its handicapped children and fulfill its educational obligations to its nonhandicapped pupils). Moreover, in any issue area more than one organization may be responsible for providing a service. Responsibility may be divided among levels of government (the federal government, states, and cities all have some say in education), or among several organizations at a single level. (New jails sometimes are built by city departments other than the corrections department).

School Systems

Most educational systems in the United Sates are decentralized. The federal government has little control over the content of educational curricula or teacher training. Federal involvement in education takes the form of disorganized special programs adressing specific populations such as the disadvantaged.[5]

State control over education varies considerably. In general, states specify general categories of pupils and their attendance rules, certify teachers, prescribe some curricula, establish funding rules and their district bases, accredit schools, and the like.[6] These patterns of control depend on the history of schooling in the individual state.[7]

The most important level of government in education is local, where school districts exercise most of the authority over pupils, teachers and curriculum. This authority includes the actual responsibility for most of what takes place in the classroom. Teachers, pricipals, superintendants and other administrators are assembled into schools which the school districts oversee.[8]

Yet the formal structure of education has little relationship to the actual instructional work of teachers and students. This phenomenon, known as loose coupling, means that educational purposes and programs are poorly linked, and uncertainly related to outcomes; "rules and activities are disconnected; and internal organizational sectors are unrelated."[9] Thus, much of what educational administrators spend their time doing has little to do with what is taking place in the classroom. They hire and fire school personnel, negotiate with teachers

unions, and spend money. They devote little direct attention of what students learn.

Loose coupling is considered to be characteristic of public organizations, such as educational bureaucracies, that are weakly based technically. No one reallly knows how best to teach children, or how to measure what educational services schools provide. Thus, in order for administrators to rationally operate this educational system, a disconnection between administration and educational outputs is almost required. Students "are admitted to Algebra II because they 'have had' Algebra I, not because they know it...They enter school by virtue of age, not competence."[10] Administrators, as a consequence, give careful attention to ritual matters such as attendance, credentials, formal program categories and labels.

The organization of special education systems is usually different. Special education services are usually delivered by an educational bureaucracy that is independent of or subordinate to the "regular" school bureaucracy. In fact, the handicaped students in a particular school and their teachers may not be under the authority of a school's principal at all, but under that of the central school district.[11] Special education often even has a separate budget. The responsibility for the handicapped child is thus likely to be fragmented.

Special education systems all perform the same basic tasks. Students are identified and referred, evaluated and placed and then provided with services. Since these tasks usually are performed by

personnel that are not part of the regular school bureaucracy, implementing any change requires that both regular and special education bureaucracies be coordinated.[12]

Most special education bureaucracies are divided along lines related to specific disabilities, being designed to channel the handicapped into one of several programs, depending on what the professional determines the child's handicap be. These categories usually include learning disabled, educable mentally retarded (EMR), trainable mentally retarded (TMR), severely and profoundedly impaired, brain damaged, and hearing impaired. In some states, such as Pennsylvania, the gifted and talented are considered "exceptional", and are counted among those children needing special services.

The field of special education aspires to scientific certainty. Research is conducted on the causes and nature or any particular handicapping condition, and on the suitable educational regimes that would remediate that handicap. It also aspires to professionalism. Proper evaluation requires a determining of the handicap possessed by an individual student based on observation of the individual student. Scientific knowledge about the proper educational regime is then prescribed based on those data.

As is the case with most scientific research, the state of the art in special education is constantly changing. Approaches to evaluation are constantly modified as knowledge increases. For example, under the developmental model, a retarded person is viewed as functioning much like a normal human being, but of a lower chronological

age. The deficit model also maintains that mental processes are the essential feature that distinguishes a retarded indidual from a normal one, but the model holds that the retarded differ from younger persons of the same mental age in the quality of certain mental processes.

Jails and Prisons

The organizational structure of penal institutions differs quite significantly from that of school systems. The bureaucracies that run prisons and jails are centralized and are tightly and hierarchically integrated. One or more city jails usually are administered by a corrections department and headed by a powerful executive who also oversees the operations of all of the other responsibilities of the corrections bureaucracy. Each jail is itself centrally administered, with a warden acting as the executive of the institution.

State and federal prison systems also are centrally administered. Most states have a corrections department that is responsible for administering all the prisons in the state. The federal prison system is headed by a director, who reports to a deputy attorney general in the Department of Justice. Under him are an assistant director and several regional directors.

There are two functional types of prisons. Custodial prisons, by far the majority, are quasimilitary in their organization. Directives from the warden flow downward to prison guards and information about what is happening in the prisons filters upward. The goal of custodial institutions is to maintain order by controlling the inmates in the institution. This is accomplished in a variety of ways issuing

uniforms to inmates of a single size and giving everyone a haircut deemphasizes the inmates personality. Prison guards monopolize information, require silence in assemblies and isolate inmate agitators.

The role of the guard, or correctional officer, in custodial institutions is critically important. Sometimes organized along military ranks, the guards are the line operators who must actualy oversee life in the prison. They must quell disorders, supervise prisons programs and operationalize all directives from the top. Since they are usually unarmed, the guards use several strategies to achieve their goals: they monopolize information, maximize the distinction between the keepers and the kept, and sometimes even we outright violence aginst inmates.

Of major importance in keeping order in a jail is an efficient classification system. Many penal institutions are divided into minimimum, medium, and maximium security units, and each inmate is "classified", according to the severity of his offense and past history, into one of these levels of custodianship. The amount of recreation he is allowed and the program in which he may participate depend on his classification. Seventy per cent of prisons in this country are maximum security institutions.

Institutions view the criminal offender more as a client than do custodial institutions and they seek to encourage his rehabilitation. In treatment prisons, the prison staff is allowed more discretion. Staff members participate in prison decisionmaking at

all levels. There are far fewer treatment institutions than there are custodial instutions.

Unlike special education, there is virtually no professional culture associated with prison and jail administration. Rehabilitation, a goal often discussed by penologists and sometimes even stated by law as a goal of penal systems is rarely of much concern to most corrections bureaucrats. Social science does not know how to rehabilitate those who have committed crimes, and the daily crises of life in a correctional institution make force jail personnel to devote much more attention to more pressing concerns. In practice, punishment of those convicted of crime and their removal from society are the actual goals of penal institutions.

The two issue areas from which we have chosen our case studies thus differ significantly in organizational structure and operations, stated and operational goals and the relevance of professionalism. In both areas, however, the courts have attempted to implement significant institutional reform. It is to the history and consequences of four of those efforts that we will now turn.

III. THE EMERGENCE OF INSTITUTIONAL REFORM LITIGATION

The decision of the Supreme Court in Brown v. Board of Education,[1] holding that officially-mandated racial segregation in public schools was unconstitutional, sparked a revolution in the role of American courts. That decision, and subsequent cases supporting school desegregation, opened the courthouse door to a host of other rights-seekers. In the following years, the handicapped, the non-English speaking, those living in poor school districts, prison inmates and other groups, all saw in Brown the opportunity to convert the unfairness they suffered at the hands of political administrative agencies into constitutional wrongs.

The courts, by and large, embraced these claims, analogizing them to the problems of blacks.[2] If the government could be faulted for excluding blacks from the benefits of an education, courts reasoned, then why not for its exclusion of other groups such as the handicapped or the Spanish-speaking? If schooling could be brought under legal scrutiny, why not other government programs? This change in role of the courts was spurred by the War on Poverty in the 1960s, which also emphasized legal rights and focused on the public officials whose duties brought them in contact with politically powerless groups. The judiciary seemed the only institution in the political system where minority claims could be vindicated.

Special Education and the Courts

Most handicapped children traditionally were excluded from receiving an

education. "The severely handicapped were viewed as something less than human creatures to be treated as decently as limited charity would allow....The handicapped were to be kept separated from the normal world."[3] At the same time, parents and other advocates for the handicapped child could not muster sufficient political strength to influence educational policy-making.[5] "The handicapped were the last ones down the road to be considered," one advocate for the handicapped stated. "If there was money left over after other people were served, then handicapped were brought in." Although many states had long run special education programs, those programs were usually operated at the discretion of local officials, and they isolated handicapped children from their peers.

Research also contributed to the handicapped rights movement, by demonstrating that even handicapped children could benefit from an education--that they were capable of becoming more independent citizens if educated. These findings undermined the policy aimed at excluding such children from the schools,[4] and the revelation that testing procedures for the assignment of children were racially discriminatory[5] made the analogy between the retarded and the handicapped stronger yet.[6]

The civil rights movement of the 1950s and 1960s stimulated political activity by the handicapped as well as black Americans. Associations of retarded citizens were formed at the national and state levels to promote the interests of their members. The Pennsylvania Association of Retarded Children (PARC), for example, ran programs for the handicapped in the state that were funded by state agencies. Soon, PARC and groups in other states began to move beyond providing services toward seeking legislative protections.

Although handicapped advocacy groups had become more politically active than ever by the late 1960s, their effectiveness varied considerably from state to state, and many of handicapped children were still being deprived of an adequate education. It was estimated in 1968 that one million handicapped children were receiving no education at all and that over 10 million were receiving inadequate services. Then PARC, in a pioneering decision, decided to go to court. "PARC had been very active in the [19]50s and [19]60s, devising programs for the handicapped...but they were getting frustrated. They had seen the civil rights movement. They saw the success of the black movement and the poverty law scene in the courts and they decided to take that tack."[7]

Penal Institutions and the Courts

The American prison in its modern form is a product of the Jacksonian hope that criminals could reform if they were placed in a healthy environment.[8] The hope was "given urgency by the fear that unless deviant activity was controlled, the very openness of American society would cause it to fly apart."[9] It is also an outgrowth of the Quaker belief that, since all sinners were redeemable, confining sinners in solitude for a period of time would allow them to reflect on their sins and emerge "penitent." By the middle of the nineteenth century, however, it was obvious that these noble goals were not met by the "penitentiary".

Prisoners have historically possessed few legal rights. Both state and federal courts did not traditionally entertain petitions from prisoners concerning the procedures or conditions in penal institutions. "Civil death" laws in most states denied these legal procedures to inmates. These states adhered to the doctrine, first enunciated by a Virginia court in 1871, that a person convicted of a crime forfeited "all his personal rights except those which the law in its humanity accorded to him," becoming a temporary "slave of the state."[10]

This position was affirmed as late as 1954 by a federal court in Banning v. Looner, which held that courts lack the power to supervise prison administration or to interfere with prison rules or regulations.[11] Under this abstention doctrine, courts could not interfere with the authority of prison officials to maintain discipline or the efforts of those officials to rehabilitate. "Prison officials at the time possessed almost unlimited discretion over prison activities: classification and segregation of inmates, work assignments, educational and treatment programs, selection for furloughs and work release programs, and other activities, a discretion they justified as an essential requirement of custodial security and the administration of punishment and the individualization of treatment.[12] Abstention also was supported by the separation of powers principle, which dictated that penal management was a legislative or executive matter largely immune from court supervision. By and large the federal courts left penal questions in the hands of the state and local officials where it traditionally resided.

In a development that reflected the general growth of judicial activism generally during the Earl Warren's tenure as Chief Justice, era, the federal courts began during the 1960s to scrutinize more closely the conditions in prisons around the country. Supreme Court decisions reforming criminal procedures, such as Miranda v. Arizona[13] and Mapp v. Ohio,[14] heightened concern about the constitutional rights of individuals after conviction.[15] Inmates also came to be seen--at least by their lawyer-advocates--as a minority that, like blacks, clacked political clout. Prison disturbances around the country, such as the Attica uprising in 1971, focused public attention on prison conditions and helped stimulate concern by activist lawyers for inmates.

These legal advocacy groups went to the courts to demand changes in the nation's jails. Local legal aid societies, state-funded prison lawyers, the Civil Rights Division of the U.S. Department of Justice, the National Prison Project of the American Civil Liberties Union, and other organizations all helped bring jail suits to the federal courts, which were more sensitive than state courts to civil rights claims.[16]

Three different types of prison cases were commonly brought. The first, a petition for a writ of habeas corpus, challenged the legality of confinement in a prison, or in a jail. The writ of habeas corpus cannot be used to challenge the conditions of confinement in an institution, but only the fact or duration of confinement. Avail

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the writ of habeas corpus can be issued only if the inmate is held in custody in violation of the United States Constitution or laws or treaties of the United States. Once the Supreme Court held in Brown v. Allen,[17] that a federal court hearing a petition for a writ of habeas corpus could address issues that had already been fully litigated in the state courts, prisoners began using the decision to bring cases to the federal courts.

Prisoners could also allege that state officials negligently exercised their responsibilities. This second type of case had only a limited value, however, because such an action in the 1960s could only be filed in state court, and many states still limited prisoner suits or restricted the legal liability of the state or its officials.

The third important basis for challenging conditions in a penal institution was Section 1983 of the Civil Rights Act of 1871,[18] a law originally designed to give newly freed blacks legal claims against Southern officials who violated their federal civil rights. A decision of the Supreme Court in 1961 that the Civil Rights Act provided a remedy for violations of prisoner civil rights as well as for violations of the rights of black Americans[19] stimulated an increasing number of petitions attacking prison conditions.

Thus, three forms of court intervention in correctional matters are now possible. Courts may determine what kinds of official behavior or prison conditions violate the constitutional rights of inmates. They may enforce prison policy as dictated by law or administrative regulations. And courts have sought to protect inmates' rights of access to the courts.[20]

These three kinds of legal action have helped provide a broad new array of procedural and substantive protections to inmates. Courts have aided inmates in preparing legal petitions,[21] as well as protected inmate access to law libraries and their right to correspond with legal counsel. Many First Amendment rights, especially concerning mail censorship, [22] the right to form prison groups, news media access to inmates, [23], and the right to worship have been upheld by the courts. [24] Other suits have challenged the medical care received by inmates, [25] the due process rights of convicted offenders,[26] visiting privileges, the inmate's right of privacy, and the liability of local governments to suit by inmates. Although the courts have balanced the rights of inmates and the security needs of a penal institution, the trend in these cases has been toward expanding inmate freedoms by giving those rights explicit judicial recognition. The discretion of wardens, prison guards and other prison officials has been narrowed, in turn, and subjected to legal rules. Most of the early jail cases tested the legality of specific prison practices, rather than the legal or constitutional adequacy of the conditions in an entire institution.

By the early 1970s, however, more ambitious suits were filed, often based on the Eighth Amendment's prohibition against cruel and unusual punishment. These suits focused on the <u>totality</u> of prison conditions in which inmates were confined. In these cases "the individual deficiencies in a prison, such as mistreatment of inmates, overcrowding, inadequate physical facilities, poor medical care, lack of sanitation, inadequate staffing, or lack of nutritious meals, were aggregated to determine whether in their totality they constituted unconstitutional confinement."[27] By 1980, twenty states

were operating under court decrees affecting all or part of their prison systems by 1980, and many more city and county jails were also involved in similar litigation. So many federal suits were filed, that the Federal Judicial Center issued a report advising judges how to handle prison suits expeditiously; the report noted that several recent Supreme Court decisions indicated that the Supreme Court favored reducing the number of lawsuits entering the federal court system by deflecting them to the state courts.

Conclusion

In special education litigation, prison reform, and other social service areas, there now exists a "new model" of public law litigation.[28] Courts, historically unwilling to hear claims challenging the adequacy of public services, are now willing to do so. This usually involves the drafting of complex blueprints to reform these services; the implementation of these reform decrees often requires that courts directly supervise the operations of public institutions and that they establish standards for service delivery and or force legislators to appropriate the money needed to pay for those services.

Since these attempts at reforming public institutions are novel, for courts are more used to explaining the meaning of vague constitutional passages than cleaning up jail cells--it is unsurprising that these reform suits rarely proceed without controversy. But more significant than the controversy these suits have caused has been the impact of court intervention on the services themselves and the organizations that deliver them. There the changes have been most profound and least noticed.

IV: THE PARC DECISION: REFORMING SPECIAL EDUCATION IN PENNSYLVANIA

Part 1. The Litigation

Pennsylvania has long attempted to educate its handicapped children. At the outset of the twentieth century the city of Philadelphia initiated activities in its public schools for the mentally retarded. In 1911, Pennsylvania required that parents send their deaf, blind, or crippled children to special schools if they could not be educated in a public school.[1] Special schools also sprang up in the commonwealth to offer services to the physically handicapped. But although this modest beginning was larger than the efforts of most states, public and private efforts for the handicapped did not greatly expand in subsequent years.

Pennsylvania renewed its commitment to special education when the General Assembly approved day care centers for the handicapped in 1951, and two years later it required each county to provide an education for the handicapped with state funds. In 1955, Pennsylvania mandated that free transportation be offered for all handicapped children attending public schools. Programs for the socially and emotionally disturbed, the brain damaged, and the mentally retarded were started in the 1960s. By 1970, the commonwealth required that all children between the ages of eight and seventeen attend school, except --importantly--for those judged "uneducable or untrainable." The seriously retarded generally fell into this category.

In the late 1960s, the Pennsylvania Association of Retarded Children (PARC), a coalition of parents and others concerned with the status of the handicvapped, concentrated its attention on the conditions at Pennhurst State School and Institution, notorious for the inhumane treatment of its patients. PARC had been unsuccessful in pressuring the commonwealth to improve

conditions at Pennhurst, but the parents' organization resisted the idea of going to court, the group's leaders feared reprisals against Pennhurst patients and against state-funded programs operated by PARC.[2] Only in 1969, after intense debate, did PARC officially sanction the filing of a lawsuit. A successful legal challenge promised a solution to the problems the legislature would not address.

Resorting to the Courts

PARC leaders, aided by Thomas Gilhool, a civil rights activist employed by PARC as legal counsel, identified five possible courses of legal action: (a) litigate individual patient grievances; (b) attack institutional misdeeds of Pennhurst officials; (c) allege that some practices constituted involuntary servitude; (d) assert the rights of patients to rehabilitative treatment; and (e) assert the legal rights of patients to an education.[3] PARC decided to press the claim that retarded individuals possessed a legal right to an education.

PARC's novel challenge to the constitutionality of excluding several retarded children from the public schools came to trial in 1971 . The complaint asserted that the absence of any hearing before a child was classified as handicapped denied retarded children due process and that the complete exclusion of the severely retarded denied them equal protection of the laws. At trial, PARC sought, through reliance on professional testimony, to prove that education could benefit all retarded children. Expert witnesses broadened the concept of education to include the acquisition of skills what

enabled children to function more successfully within their social environment. Although reading, writing and arithmetic might give the normal child intellectual mobility, PARC argued that this laudable goal had limited application to the exceptional child. What such youngsters needed instead was mastery of skills that permit greater physical mobility, and, hence, greater autonomy: teaching children how to use public transportation or even how to tie their own shoelaces furthered that autonomy. Self-sufficiency, PARC argued, was the constitutionally mandated goal.

After a single day of hearings, the state conceded PARC's point. A consent agreement ratified in 1971 established the right of all retarded children in Pennsylvania between the ages of six and twenty-one to a free and appropriate public education.[4] The decree was given final approval the following year.

The favorable political atmosphere contributed to the quick and amicable settlement. The newly elected governor, progressive Democrat Milton J. Shapp, and Attorney General J. Shane Creamer, both hoped to improve special education. The commonwealth itself never really disputed the rightness or legal merits of PARC's suit. "They almost rolled over and played dead," one PARC representative later said and the consent decree revolutionized special education.[5]

The consent agreement required that the state develop a plan to identify and evaluate all mentally retarded children, that it offer these children a suitable education; that it place these children in classes as similar to regular classrooms as possible, that it permit parents to resolve complaints about diagnosis and placement issues in due process hearings. Whoever loses

at the hearing stage may appeal the decision to the state department of education, and ultimately to the courts.

To implement this agreement, the court appointed two masters: Dennis Hagerty, long active in the PARC organization, and Herbert Goldstein, a special educator. A Right to Education Office, under the aegis of the Pennsylvania Department of Education, was charged with implementing and monitoring the consent decree. On the local level PARC task forces were organized to serve as a forum to which parents could bring comments and complaints and to help in implementation. A task force containing representatives from the Department of Education, the Department of Public Welfare, and Governor's Office, and the Pennsylvania Association for Retarded Children, was created to monitor statewide compliance with the PARC decree.

The Aftermath of the PARC Agreement

The PARC consent agreement had significant agenda-setting consequences around the country, encouraging similar activism on behalf of the handicapped in other states and at the federal level. In 1974, 899 bills protecting handicapped education were introduced in state legislatures around the country and more than 200 were passed. By early 1973 more than 80 percent of the states had required at least some education for the handicapped. For example, in Mills v. Board of Education for the District of Columbia,[6] a federal court, relying on PARC, held that excluding the mentally retarded, emotionally disturbed, hyperactive and other children by the District of

Columbia from its public schools, and the denial to those children of an opportunity to challenge their educational status, violated the Constitution. The court ordered Washington to provide to handicapped children a "free" and "suitable" publicly supported education, regardless of the extent of that child's impairment. It also mandated that certain due process rights, patterned after those contained in PARC, be instituted.

The federal government's commitment to special education also increased rapidly after PARC. In 1973 Congress prohibited discrimination against handicapped individuals in programs receiving federal aid.[7] Legislation passed in 1974 declared that all handicapped children are entitled to a free public education.[8] States were required to outline their plans for assuring that their handicapped children received an education. The law also decrees that states receiving federal assistance afford certain due process procedures to the handicapped.

Washington went further in the Education for All Handicapped Children Act.[9] That act, also borrowing from PARC, mandates that handicapped youngsters be given an "appropriate," publicly-funded education, commensurate with their needs and abilities. It also requires a written individual educational plan (IEP) based on full individual assessments for each child. It calls for parental participation in determining and implementing these individualized programs of study; disputes between parents and school districts are to be aired in due process hearings. The act decreed that states must offer transportation, developmental, corrective, and supportive help, as needed, to allow a handicapped child to benefit from special education.

The Implementation of Special Education Refom

The implementation of the PARC agreement in Pennsylvania followed what has become a common pattern of institutional reform litigation: school officials initially had a difficult time making changes ordered by the court, but then made sincere but incomplete attempts to comply; quarrels between state and plaintiffs about the details of implementation led to the filing of subsequent suits; and the court continued sporadically to oversee implementation. Attention in Pennsylvania has evolved from concern with giving the handicapped access to education from which they were previously excluded to a focus on individual grievances or technical matters hitherto left to the judgment of special educators. In addition, the PARC system is now more rigidly concerned with legal values than its framers had hoped, and possesses less autonomy than they had wished.

The education system in Pennsylvania quickly accommodated the retarded children in the public schools. The Right to Education Office, founded in the aftermath of PARC, became an integral part of the state educational apparatus. That office has monitored PARC implementation along with the court, provides technical support to local officials, and administers the PARC hearing system.

The legal division of the state education department made special education one of its central responsibilities. Several dozen hearing officers were trained and assigned by the state to hearings on the basis of their expertise, while the state education department monitored their performance.

State inspectors assigned to each of ten regions within Pennsylvania assessed whether the decisions of the hearing officers were being given meaning in the schoolhouses; their mandate included review of districts that conducted few hearings, and assuring that retarded children in such places--most typically, small and rural districts--also received appropriate attention. At the local level, the special education office, previously a marginal part of the school organization, acquired new authority.

PARC also obliged schools to attend to the parents of retarded children. In many districts, school administrators, special education professionals, citizens' groups and private agencies concerned about the handicapped joined local task forces. In the summer of 1975, after Congressional passage of the Education for All Handicapped Children Act, the Pennsylvania board of education adopted regulations which required that all handicapped children be provided an appropriate education under the PARC guarantee.[10] As a result of a federal court decision in Catherine D. v. Pittenger the gifted and talented received the same assurances in 1975.[11]

But these initial efforts encountered serious problems. Although Pennsylvania's department of education was responsible for hearing appeals from school districts and assuring a consistency in the hearing process. The department was ill-equipped to manage the appeals generated by the due process system. As then-Secretary of Education John C. Pittenger observed:

> Those hearing appeals were generally written by an assistant attorney-general and signed by me or my executive deputy...at least five different assistant attorneys-general were working on that problem in the years that I was Secretary....Not only was there equally rapid and sometimes unforeseen turnover at every level of that department, including three attorneys-general in five years. The result was a total lack of planning and coherence up and down the line.
> In addition, we were constantly under the gun. PARC and others were complaining that we were not hearing the appeals quickly enough. That put a premium on getting the cases out in a hurry--not on developing a consistent body of law. In fact within the last year, 1977, the department has fallen so far behind that I think they have had to farm out appeals to practicing attorneys in Harrisburg! That is a deplorable practice, but given the state of the budget and the impossibility of hiring additional staff, it seems to be the only solution.[12]

The situation has become more stable since 1977. A single lawyer in the department of education has been assigned continuing responsibility for the hearings, thus routinizing and regularizing the appeals procedure. That attorney places less weight on the hearing officers' decisions,and views them as recommendations to be modified when he discerns good reasons to do so.

This stabilization of the state legal office has enabled officials to shape a legal system in other ways. That office now casts appellate opinions in a more strictly legal format, drafting them in the expectation that they will afford guidance in similar disputes, and serving as precedent in subsequent appeals.

The system PARC established was supposed to be an autonomous one--controversies about special education were to be resolved through the hearings and appeals, without reference to the courts. That aspiration has been only partly realized. Subsequent decisions of the federal courts have undermined the independence of the PARC system, subjecting the PARC regime

to continuing external review. In so doing, the Courts have reduced the significance of the administrative hearings and appeals. The courts also have been asked to give concrete meaning to the more vague references of the PARC consent decree. One of these cases, Fialkowski v. Shapp,[13] speaks directly to the autonomy of the PARC due process system. The others, also attentive to the reviewability of PARC administrative judgments, focus on the categories of handicap that PARC reaches or the quality of services that handicapped children receive under PARC. Whatever the caliber of the due process hearing and appeals procedure, it has not become a self-contained enterprise It is instead regularly subject to federal judicial supervision.

Fialkowski v. Shapp was brought by the Philadelphia Center for Law and Education on behalf of multiply-handicapped children and clearly confronts the question of the autonomy of the PARC appeals process. Money damages were sought from school officials in Philadelphia who allegedly had provided the children of the defendant's only babysitting, not "appropriate" training. While the Fialkowskis had disputed the placement offered by the school district an an administrative hearing, they did not appeal the hearing decision, as PARC specified, but proceeded instead to federal court. While it is a legal commonplace that would-be litigants must first exhaust their administrative remedies, the court nonetheless heard the dispute, thus diminishing the importance of PARC administrative appeals process. (Under the relevant federal statutory provision, only the judiciary, not an administrative official, can adjudicate damage claims arising out of asserted deprivations of constitutional rights.) By permitting a claim for damages to be heard, the federal court invited any family displeased with the quality of

education its retarded child receives to bypass the administrative process entirely, proceeding directly to court. In addition, once the damage claim has been decided, the judge may also settle substantive claims about wrongful classification or the quality of treatment.

While going to court has its drawbacks, cost foremost among them, seeking judicial relief nonetheless has been an attractive option for many parents of handicapped children because the administrative hearing-review process generally favors school districts. But if reliance on the courts becomes widespread, the administrative process would regularly be upstaged. The effect of such re-judicialization of special education has to limit the administrative system's authority, leaving only routine cases of modest import left for decision at this level.

The drafters of the PARC consent decree did not contemplate this re-judicialization of special education. They envisioned the implementation of an effective administrative review and appeal system. But in Fialkowski (1975) the federal district court found that although the PARC procedural safeguards might prevent retarded children from being excluded from school, they were inadequate to prevent total exclusion from education. The court concluded that the hearing and appeal process defined the appropriateness of an educational program by deciding whether it met state certification requirements, an approach that ignored the content of the program in question. While that assertion oversimplifies--administrative opinions in 1975 were both more complex and less coherent than Fialkowski acknowledges--it is the judicial perception that matters most. Fialkowski effectively pronounces PARC's effort to create a law-like system a failure. "The exhaustion of

state remedies by these plaintiffs is likely to be futile," the court concludes, both because of defects in the quality of the system's determinations concerning appropriate treatment and because a key type of relief, money damages, can only be ordered by a judge.

Frederick L. v. Thomas[14] criticizes the hearing review process on even more fundamental grounds than Fialkowski. Frederick L. was a class action suit brought by several public interest litigant groups (the Delaware Valley Association for Children with Learning Disabilities, the Philadelphia-based Legal Services Committee, and the Educational Law Center of Philadelphia) on behalf of children with specific learning disabilities. They sought to require that Pennsylvania and the city of Philadelphia provide them with an "appropriate" education. The state asserted that it had already made such a statutory commitment, rendering an injunction unnecessary. It also claimed that due process hearings mandated by the state board of education, identical to those provided in disputes concerning retardation, "will make the program for identifying learning disabled children fully effective."

Reliance on administrative due process to implement the new statutory entitlement was rejected by the Frederick L. court. The basic weakness of the approach, the court found, was that it depends on the parents to initiate review. Because this requires that parents spot a problem, but learning disabilities may go unrecognized. If there is an entitlement to treatment that responds to this particular and subtle learning impediment, the court concluded that parents should not have to demonstrate its existence. Instead, the state must "institute a system to identify" learning-disabled youngsters. Federal Judge Newcomer also held that Philadelphia had not done much to

identify the learning disabled, and that its services for the children were inadequate.

It is hard to imagine a harsher comment on the effectiveness of a procedural regime such as that established under PARC. Although Frederick L.'s conclusions are limited to the learning-disabled, the court's basis for distinguishing the retarded--its assertion that retardates are more readily identified than the learning-disabled--is unconvincing, for many PARC administrative appeals decisions suggest that learning disability is no harder to diagnose than mild retardation. If parental initiative is inadequate to trigger attention in the one instance, why not also in the other?

Halderman v. Pennhurst State School and Hospital[15] challenged conditions at Pennhurst State Hospital, but that decision also further undercut the autonomy of the PARC administrative appeals process in matters concerning "appropriate" education. The opinion confronted issues of institutionalization broadly, treating education and training as part of a larger concern with "habilitation." The federal court, unlike the hearing officer and Secretary of Education, was willing to entertain the claims of a class of individuals--all those residing at Pennhurst--and this is critical to the case. Although the particular substantive conclusions of the district court opinion--assignment to Pennhurst violates individuals' constitutional rights and the mandated closing of Pennhurst--were overturned by the Supreme Court, the propriety of class relief went unquestioned.

Armstrong v. Kline,[16] another case brought by the Education Law Center of Philadelphia, expanded the substance of the PARC entitlement well beyond what the administrative appeals system was willing to mandate. Federal

Judge Newcomer ordered school officials to provide the handicapped with a 365 day school year, where needed, to secure an appropriate education. A 180 day school year is required for non-exceptional children. The state's plea that the cost of such a provision would be too high left the court unmoved. Armstrong has spawned continued controversy--five of the hearings held in 1980-81 concerned whether an extended school year should be offered.

That the court may engage in routine oversight of the due process system in Pennsylvania is supported by Tokarcik v. Forest Hills School District.[17] Tokarcik was brought to federal court after the parents had lost at both a hearing and an appeal. The court ordered a school district to provide clean intermittent cathetarization (CIC) for a child afflicted with spina bifida, defining CIC as a "related service" under applicable federal law, and hence something that a school district must provide free of charge to students who need it.

Implementation of that case alone added more than $1 million in state educational costs in 1981. But the particulars of Tokarcik matter less than the appellate court's view of its function as an "external check" on the due process system, guarding against possible procedural deficiencies or institutional pressures inherent in the educational and administrative system.

This conception of the courts' continuing mission expands on the PARC understanding. The drafters of the PARC consent decree had hoped that decisions about educational placements were to be made by lawyers and professionals, combining their distinctive approaches in the setting of the due process hearing. That courts are willing to oversee hearing outcomes means the judiciary ocassionally will intervene in the PARC system, even

when less than major change is sought. The provision of CIC to Amber Tokarcik is a routine issue; in the earlier years of the PARC system, parents would not have sought judicial help in obtaining that service. They would have confined their efforts to the due process system.

This continued judicial involvement in supervising Pennsylvania's special education system is also apparent in the prolongation of the PARC litigation itself. In 1977, the Philadelphia Association for Retarded Citizens filed a motion against the city of Philadelphia to compel that school district to implement the PARC mandate.[18] The Fialkowski family filed a similar motion at the same time on behalf of their retard sons.[19] In attempting to resolve the controversy, Federal Judge Edward Becker met informally with both sides between 1977 and 1981 "to collect more information, to settle disputes, and plan and monitor the efforts of the schools to establish appropriate educational programs."[20] These hearings ended in 1981 and Judge Becker presided over the signing of a new consent decree a year later. Some progress has been made in solving the logistical problems involving the inclusion of handicapped children in the Philadelphia school system and the hearings helped narrow the scope of conflict and its intensity.[21]

That does not mark the end of the matter, however. In the latest stage in the evolution of the Frederick L. case, Judge Clarence Newcomer approved in 1982 a settlement that could end more than six years of legal controversy about the quality of education for learning disabled students in Philadelphia. The settlement commits the city to the elimination of illegal waiting lists on which many learning disabled students are placed because no appropriate classes are available. A spokesman for the plaintiffs in the suit, the

Education Law Center of Philadelphia said that compliance by the city with its consent decree would mark the conclusion of the Frederick L. case. But one wonders, for with lawsuits still being filed, the courts seem a permanent part of special education policymaking in Pennsylvania. PARC appears to have fixed the beginning, not the end, of judicial involvement.

The participation of the courts in Pennsylvania special education also reveals that the courts recognize the limits of the administrative hearing process, originally intended to substitute for judicial review. PARC due process hearings are well adapted to standard special education disputes--the provision of transportation and private school placement, for example--and questions that concern individual students; but even in those cases, as Tokarcik indicates, the system may be slow to recognize new legal obligations.

Issues that require substantial structural change in educational practice (the provision of an extended school year, for instance) or controversies concerning a large class of students (the adequacy of the education provided to learning disabled students by Philadelphia, for example) lie beyond the capacity of the due process mechanism. The resolution of these more fundamental problems demands continuing political and judicial intervention. The growing tendency to initiate judicial action reflects disenchantment with the due process hearing as a vehicle for achieving educational entitlements for the handicapped. It requires a lowering of earlier expectations about the change that could result from incorporating legal forms within the bureaucracy.

Within the PARC system the danger looms that fidelity to law will become transformed into legalism, "rigid adherence to precedent and mechanical application of rules," without continuing attention to the purposes behind those rules. Many hearings and appeals focus on procedural, not educational, matters; technicalities often carry the day. This legalism hampers "the capacity of the legal system to take into account new interests and circumstances, or to adapt to social reality."[22]

Support for special education in Pennsylvania also rests on a fragile political foundation. In the first few years after the PARC settlement public officials and advocates for the handicapped tacitly agreed that a fixed proportion of the commonwealth's education budget should be spent on exceptional children. This agreement, essentially political in nature, helped avoid endless wrangling concerning the necessary state-wide cost of an appropriate education, by focusing attention on improving the delivery of educational services.

In an era of fiscal stringency, however, such a political committment became harder to sustain. During fiscal year 1981-82, for example, Pennsylvania lost more than $150 million in federal funds, necessitating the elimination of 1369 state jobs. Cuts in state financial aid may have to be made, yet the right to an appropriate education is supposed to be guaranteed to all exceptional children. In Pennsylvania there already have been the stirrings of dissatisfaction with the high cost of special education, as more and more state legislators have sought to reduce appropriations for that area. One Secretary of Education, Robert Scanlon, has lobbied the federal government to limit the scope of handicapped education programs and has proposed a new

funding formula that would give local school districts more discretion in allocating special education money.

In the heyday of Pennsylvania's commitment to special education, the state legislature would ask the Department of Education how much money they needed to do an adequate job. Now the legislators give the department a sum of money and orders it to shape a program tailored to that amount. "If you have four psychologists, why can't you get along with three?" they ask.[23] The legislature is also contemplating reducing its aid to the commonwealth's private schools and revising the school code so as to make special education less costly.

Problems are exacerbated in the big cities, notably in Philadelphia, which has severe financial problems coupled with wheezing bureaucratic machinery. As former education secretary John C. Pittenger wrote a few years ago about that city's attempts to comply with the Frederick L. decision, "it really doesn't make any difference what any court says--the district lacks $170,000,000 of balancing its budget for the current year (1977-78) and (education officials have) more pressing things to do than revamp (their) program for learning disabled children in line with Judge Newcomer's dictates."[24] Federal revenue sharing money, which in Pennsylvania was largely spent on special education, also has been reduced. Criticism of the high cost of special education will probably continue to be heard in Pennsylvania.

More than a decade after the entry of the PARC decree the federal courts persist in trying to reform special education. Though these reforms may well be needed, they compete with the more politically popular drives to reduce the cost of government. How are the financial burdens of special education to be borne, by whom, and at what cost? Such questions continue to stir controversy and invite speculation in Pennsylvania--and to come before the courts.

Part 2. The Impact of Special Education Reform in Pennsylvania

The consent decree in PARC v. Commonwealth of Pennsylvania recognized the right of every retarded child to an "appropriate" education. Subsequent federal legislation made that substantive entitlement available to all handicapped children in the United States. The substantive right to an education elaborated in both the PARC decree and the subsequent federal law PL 94-142 relied on both procedural guarantees and other legal devices for attaining desired outcomes. In Pennsylvania, adjustments have been made in the scope of the original mandate, but the reliance on legalism to achieve education goals continues.

The court in PARC did not confine its efforts to a declaration of rights, leaving the task of implementation in the hands of school officials. Nor did it initiallly carve out a continuing monitoring role for itself as a manager of the implementation process. Instead, PARC

converted substantive issues concerning the right to an appropriate education into matters of procedure, and required the state to actively bring new handicapped pupils under the PARC umbrella. Parents who disagreed with diagnosis and placement decisions made by school districts could request a formal due process hearing to challenge such decisions. Whoever lost at the hearing stage could appeal to the state education department, and ultimately to the courts. This new system promised fairness to individual claimants, but the ambitions of PARC were larger: it was anticipated that PARC hearings would bring about institutional reform and individualized justice.

The elements of the PARC entitlement all speak to this expectation. The PARC due process system includes an administrative hearing with an impartial hearing officer and a requirement that the decisions be based exclusively on evidence introduced into the record --elements of legal form designed to promote reliability in particular judgments. Appeals from hearing decisions were supposed to serve two distinct purposes: to impose procedural regularity in the conduct of the hearings and to promote uniformity of outcome in factually similar cases through adherence to precedent.

After a decade in operation the success of legal reform of special education in Pennsylavania has been mixed. The greatest change has been in the formal aspects of Pennsylvania's special education system. More handicapped children are being served than ever before, the education bureaucracy has been overhauled, and the due process system has regularized evaluation and placment decisions. Yet problems also have

developed. Regularization has come at the price of bureaucratic rigidity. The courts have shown little inclination to address some of the issues of educational quality that the PARC litigation engendered; nonnetheless, they have maintained oversight for a length of time far beyond that ever expected by the plaintiffs when they filed the original suit, an oversight that has caused substantial administrative chaos.

Impact: Services

In the 1970s, special education in the commonwealth of Pennsylvania "experienced recognition and growth unprecedented in its history"[25] due in large part to the cumulative effect of judicial activity. In 1970-71, the year before PARC went into effect, 160,984 children were provided special education services in Pennsylvania public schools, or in private schools at commonwealth expense. By 1979-80, the last year for which complete data are available for this study, that number had risen 50 per cent. This increase is even more impressive when viewed in the light of declining school enrollments: the proportion of students receiving special help jumped from 6.7 per cent to 11.3 percent between 1970-71 and 1979-80. One attorney working for the commonwealth thought that PARC's most important legacy was that it gave handicapped children, who had been "significantly excluded" from education access to it for the first time.

The expansion in special education enrollment has been matched by a growth in the commitment by school districts to serve the needs of

handicapped students. In 1973-74, for example, the special education budget for the city of Philadelphia was $24.6 million, with 12,000 students being served by 1711 staff members. In 1979-80, Philadelphia's budget for special education was $66.5 million. During that year 23,000 children were served by a staff of 3,666. Similarly impressive growth occurred in other districts around the commonwealth and at the state level. Governor Milton Shapp helped ease the financial burden imposed by PARC on local school districts by diverting a large share of federal revenue sharing funds, available for the first time in 1973, to special education.

There is much less evidence of change in the quality of the special education services offered. The few studies that do exist of thgat subject indicate that their quality has varied considerably.[27] The courts have not systematically addressed educational quality issues, and even the PARC lawsuit itself has rarely done so. The courts have focused on ther measurable: on the quantity of services delivered tohandicapped students or with expanding the coverage of the original PARC decree to include new student populations.

Impact: Bureaucratic and Administrative

At both the state and local levels, the education bureaucracy changed to accommodate the presence of significant numbers of handicapped children. The Right to Education Office founded in the aftermath of PARC became a permanent part of the state apparatus,

monitoring PARC implementation, providing technical support to local officials and administering the PARC hearing system.

The legal division of the state education department has made special education a central responsibility. It trains the hearing officers mandated by PARC, assigns them to disputes on the basis of their expertise, and monitors their performance. State inspectors, assigned to each of ten regions within Pennsylvania, oversee school district behavior. In local districts the special education office, previously of marginal importance to the school organization, has acquired new authority. Public attention has also brought to special education new prestige formerly lacking,"[29] and this too has led school officials to take seriously the concerns expressed by parents of handicapped children.

A continuing dispute over the propriety of separate facilities for the handicapped has marred implementation of the PARC consent decree. During the 1960s many Pennsylvania school districts and intermediate units constructed elaborate school buildings for the education of children possessing certain handicaps. Hailed at the time as a progressive step, one demonstrating the commonwealth's historic concern for the handicapped, the PARC agreement made rendered these facilities instantly outmoded. The agreement's commitment to the placement of children in classrooms as close to the educational mainstream as possible obliged school districts to justify assigning handicapped yongsters to these new, separate facilities. Not surprisingly, parents of handicapped what is now the Federal Office for Special Education,

along with parents of handicapped children, saw these separate facilities as legally suspect under the PARC agreement and attacked their use. Local school district officials defended in court their segregative decisions, and the matter has not yet been fully settled.

But what of the centerpiece of the PARC enforcement apparatus, the due process hearings and appeals? Litigants anticipated that this apparatus would insure newly established substantive and procedural rights, and give meaning to the idea of an "appropriate education" for handicapped children. The reality has been more modest. The due process hearings have specified a very limited class of rights. The issues they deal with are individual, not systemic, in nature, and they are disposed of routinely. Demands which would require substantial expenditures or structural change in the system--requests for wholly new programs, for example, have been successfully resisted. The changes which are put into effect have been, as a consequence, modest in their character and marginal in their impact.

In other areas, too, PARC has had profound effects. At the local level it appears to have spawned a movement for greater regional cooperation regarding transportation, supervision of special education classes, and an increased coordination between neighboring school districts. School district administrators have accommodated themselves to the demands of the new legalized proceedings. Though some of the early hearings were marked by disputes over technical legal points--adequacy of notice and the like--these have decreased markedly

in recent years. The growing tendency of school districts to rely on legal counsel has made this adaptation easier.

Those dissatisfied with the outcome of the due process hearings have the right, under PARC, to appeal to the state education department. This appeals process was intended to serve two functions: to elaborate substantive legal standards and to manage the procedure used at the hearings. Though the number of appeals has stayed relatively constant since the early 1970s, consistency among decisions was not to be found at this time. More recently, something akin to to a system of precedent has begun to evolve. Yet the precedents themselves further diminish the ambit of professional discretion. The message of the appeals decisions, as of the hearings, is that the commitment to "appropriate" instruction is an ideal tempered by accommodation to program availability and resource constraints.

It was hoped that working with the cooperation of state special education administrators rather than taking an adversary role toward them would yield a greater commitment by the defendants to implementation. Despite these hopes, the implementation of PARC has been accompanied by considerable acrimony at all levels. The city of Philadelphia, most notably, has been in and out of court defending itself against attacks from angry parents challenging the adequacy of its programs; Philadelphia, in turn, has quarrelled with the state education department about various aspects of PARC implementation.

The PARC due process system prompted a defensive reaction on the part of school administrators. One high-ranking special educator

complained that the litigation overwhelmed the ability of administrators to assimilate the large amount of detail contained in the court orders.[28] Another described the attempts by the Pennsylvania defendants to implement the PARC entitlements as "grudging", with administrators reacting to special education crises and only reluctantly implenting controversial policy decisions. Still another complaint faulted with the lack of discretion that that consent judgment left to special educators. School administrators also resent the encroachment of nonexpert citizens groups on their domain of expertise. Administrators complained about the high cost of the litigation.[29] Participation in legal proceedings and related preparations such as taking depositions of witnesses are a tremendous strain on resources.

Turnover at the staff level hampered implementation. There were three attorneys general in five years and five different assistant attorneys general working on the PARC appeals during the 1970s. This led to a "total lack of planning and coherence up and down the line."[30] Parent groups such as the Pennsylvania Association for Retarded Children pressured the education department to process appeals with dispatch. That "put a premium on getting the cases out in a hurry--not on developing a consistent body of law."[31] Courts, said one official, do not have the time to attend to the complexities of administration. They tend to focus on only one facet of complicated social problems.[32]

The entry of the federal court into special education led to a clash between legal and professional approaches to educating the

handicapped. One special educator complained about the court's adoption of one particular way of addressing the educational needs of the handicapped. This made it difficult to meet the demands of a situation, because many changes an administrator might make would violate the consent decree or subsequent court decisions. A lawyer working on appeals for the state agreed. Although believing that all legislation or court action concerning special education must embrace a single philosophy, he wondered whether "freezing" any one philosophy into court orders was advisable in a field that changed so constantly. "If the state of the art is compliance", he said, "Then noncompliance is the order of the day...When it comes down to pedagogy a [judge] should leave it to administrative discretion." He cited as an example the time and money expended by the city of Philadelphia to teach the approach called "signing" to deaf children, an approach which later diminished in popularity among special educators in favor of using picture books and language boards. If Philadelphia wanted to keep pace with these changes, it had to make massive changes in its educational offerings, a task that would prove difficult in such a fiscally burdened urban school systems and which face "incredible" social, fiscal, and educational problems. [33]

Nor are professional concerns the only determinant of the kinds of services children receive. Organizational concerns of school districts significantly influence the placement decisions of school districts. Students sometimes are assigned to the most appropriate program available rather than to the most appropriate program possible.

Consider, for example, those who showed evidence both of retardation and of some other abnormality. A child who can be labeled retardate is appropriately assigned to a class for retardates, while the multiply-handicapped child demands a more tailored placement. All school districts operate programs for the retarded while only some manage classes for the learning disabled, and almost none, at least in the beginning, had programs offering simultaneous treatment for both kinds of handicaps. It makes good bureaucratic sense for a school district to urge that the child in question is labelled retardate and then assignment to a program for retardates be deemed appropriate. On the other hand, parents shun the label "retardate", preferring a more individually designed program for their child.

Questions concerning appropriate placement, therefore, nominally professional in nature, actually can turn on the capacity of existing programs to address divergent needs. These questions, in turn, lead to disputes about the relationship between resource availability, the adaptive capacity of public organizations and appropriateness. Does "appropriateness" mean "best" in light of what a school district presently offers? When these issues arise in appeals, the state often gives some consideration to the school district's ability to offer the needed program. If the school district does not provide such a program, the child sometimes is placed in a reasonably appropriate program, not the most appropriate. This adjustment of competing values is an important characteristic of the PARC system throughout its ten years in existence.

Decisions about diagnosis and placement issues are also shaped by other factors. A 1977 study conducted by the Pennsylvania Office of Budget and Administration found evidence that placement of handicapped children into certain categories of exceptionality occurred for reasons other than an objective assessment of the child's emotional, mental, and physical status. Children from more affluent backgrounds are less likely to be placed in educable mentally retarded (EMR) classes than are children from poor backgrounds. Simultaneously, studies of brain injured/learning disabled placements in Pennsylvania and elsewhere indicate that children from wealthier backgrounds are more likely to be placed in classes designed for those categories than are poorer children[34]

The PARC settlement also went imperfectly implemented because of bureaucratic inertia. It met with considerable initial resistence from regular school personnel who resented the fact that the court seemed to be telling them how to do their jobs. Others, though opposing the encroachment on their autonomy, have learned to use the legal system for their own purposes. "There are a good many [school administrators] calling up seeking to be told what they want to hear," said one lawyer for the Philadelphia school district. "My job", he continued, "is to tell them what's within their discretion."[35] Although the great initial resistance to judicial intervention has diminished somewhat a decade after the PARC decree, some school principals still resent the strong role that the courts and attorneys now play in special education policymaking. They adhere to the "captain of the ship" theory of school

administration, and jealously try to preserve their professional autonomy.[36]

Impact: Political

The educational needs of the handicapped are now given much attention by the Pennsylvania legislature, the governor, and the department of education, as public officials have grown far more likely than ever before to consider and act on the demands of handicapped children and their parents.[37] To some extent, elected officials have embraced as their own the values enshrined in the PARC consent decree: that the handicapped ought to receive an education, that consistent and accurate diagnoses be made, that placements be as fitting as resource constraints permit and as close to the regular classroom as possible. The state department of education, committed to these values, monitors special education programs, despite accusations from the city of Philadelphia--resistant to state initiatives generally--that it has defaulted on its financial commitment to supporting special education in that city. Task forces in many districts, have drawn school administrators, special education professionals, citizens' groups and private agencies concerned about the quality of programs offered by school districts.

New programs for the handicapped often resulted from parents resorting to the due process forum or the courts, rather than from state

prodding. But these parental efforts , at least in the first few years after PARC, usually found a sympathetic or politically sensitive ear among state legislators. "No one wanted to appear to oppose handicapped education", said a former secretary of education. "That's why the special education bills sailed through."[38] The suits have made a difference in spawning greater public awareness of special education issues. One Philadelphia special educator said that after a decade, the spate of litigation had given the public a sensitivity to special education issues that it formerly lacked.[39]

One indicator of the growth in political importance of special education in Pennsylvania is been its increasing share of the state budget. During the year before PARC, $64 million was expended on special education in public and state supported private schools; by 1979-80 expenditures had almost quadrupled, to $236 million. During this period special education fared much better in Pennsylvania than spending on education more generally (which increased by 193 per cent) or the Consumer Price Index (which increased 203 per cent) during those years.

Yet in times of fiscal stringency such support is more difficult to sustain. Federal money for special education declined by about one-fifth between 1981-82 and 1982-83. In Pennsylvania, the problems that attend a declining resource base are exacerbated by other factors: the great variation from district to district in public funding for special education, and fragmentation in funding sources.[40] There is also a movement in the Pennsylvania legislature to adopt a block grant

system for distributing special education money. Under such a system the school district would decide on the appropriate educational setting for its handicapped children and the district would have great discretion in deciding how special education money is allocated. Court opinions such as the Armstrong decision have further complicated fiscal planning in recent years, by requiring that new children be served, regardless of commonwealth please that special education expanmsion would cost too much or cause adminisitrative inconvenience. This the recent erosion of legislative support for special education may portend a different political climate for these issues in the next few years. The prospect of a direct clash between guaranteed legal rights and fiscal reality appears imminent. It is uncertain whether this tension can be resolved without continuing judicial intervention.

Impact: Process

Court intervention in Pennsylvania's special education system also has significantly shaped how policy is made. Special education is no longer the exclusive concern of the bureaucrats in the department of education or the special educator; now, "lawyers, parents, or anyone can contribute as much as special educators".[42] For parents especially, the educational benefits that PARC promises their children are incentives to participate in the due process system and to keep court scrutiny of special education in the state continuous.

Influential among these new participants are the interest groups. In the 1960s the Pennsylvania Association of Retarded Children, was most active in special education; today there are many more visible groupls, including the Advocates for the Developmentally Disabled and the Philadelphia Police and Fire Association for Handicapped Children. "Many more people are now experts," said one special educator, with some sarcasm. "There was a time when very few people knew anything about special education," said one bureaucrat, pointing out that most of those people were based in colleges and universities.[42] When these professionals do play influential roles, it is as court witnesses, or as sources of expertise to litigant groups. The administrator noted that the college professor who worked hand in glove with the schools a generation earlier, is now allied to advocacy groups and opposed to "administrative types."[43]

Advocacy groups have enabled middle class parents to participate in the process of policymaking in Pennsylvania special education. These groups, PARC foremost among them, have pressed the initial PARC suit and its progeny--Frederick L., Fialkowski, Tokarcik, Armstrong--as well as the hearings concerning the implementation of the original consent decree. They educated parents in the workings of the due process system, and they exerted continuing political pressure. The willingness of such groups to file suit over their grievances, especially strong in recent years, has turned the federal court into an important policymaking forum. The hearings in Judge Becker's courtroom concerning the implementation of PARC II, for example, became a "group

session" for parents, allowing them to circumvent the due process system entirely. Parent claims in these sessions ranged from the trivial ("The bus was late again today") to the general("Why aren't the severely handicapped in Philadelphia being adequately served? Most concerns aired in the hearings focused on procedures and on the distribution of political authority among institutions accompanying school reform. Left unresolved is the state's role in monitoring local school districts, as well as many of the educational quality issues that seem to be of little interest to the lawyers who are so active in the suits.

Differences in litigant strategy among those unhappy with the special education system also have become evident. The Philadelphia Association for Retarded Children (Philarc) decided to work directly with school administrators on transportation problems and other issues in a nonadversary fashion. In fact, Philarc eventually signed contracts with the Philadelphia school system allowing it to consult in the design of special education programs. Other litigants including the Advocates for the Developmentally Disabled, and the Police and Fire Association for Handicapped Children, followed a more militant course. These groups, withdrew their representatives from the joint monitoring committee appointed by the federal court to oversee implementation. They urged Judge Becker to enforce more vigorously the legal responsibilities of the city and state.

Parents now use the rhetoric --and the clout--of rights secure their educational preferences. Middle class parents prod school districts to have their children classified as learning disabled rather

than mentally retarded. Parental pressure also plays a major role in classifying EMR children as brain injured or learning disabled, so that they can be enrolled at state expense in private schools.

Judicial intervention in Pennsylvania special education makes the courts important actors in the process of policymaking in special education. Court decisions established the original PARC entitlement and set up the due process machinery that was to secure that entitlement. Subsequent court action broadened the coverage of the PARC consent decree, monitored its implementation, and then attempted to resolve any subsequent problems with implementation.

Lawyers, especially those from the Philadelphia Center for Law and Education, now play a critical role in policymaking. They bring together disparate parental grievances and represent parents in court. In the Fialkowski case, for example, the Philadelphia Law and Education Center helped the Fialkowski family file suit in court; when their for monetary damages against Secretary of Education John C. Pittenger was dismissed, Gilhool was soon back in court demanding that contempt citations be issued against Pittenger and his staff.

Legal advocacy groups possess another tactical advantage in Pennsylvania: they can prevail without actually having to sue: "A school district is aware that you can shut down a system. Just file 25 [ue process] hearing requests in one week", said an attorney with the Center for Law and Education.[44] That gives litigants something to bargain with.

The significant role played by lawyers and parents means that there is little incentive for them to move for judicial disengagement from the case; that is one reason why the PARC litigation in its various forms has lasted for over a decade. One of Judge Newcomer's clerks, for example, who had worked on the Frederick L. decision, subsequently joined a small firm in New York City that specialized in handling due process hearings for handicapped children. It exaggerates, but not by much , to term the PARC decree and P.L. 94-142 the "Employment of All Unemployed Lawyers Act."[45]

The role of parents also has been critical in prolonging the litigation. In more than one instance it was parental pressure that led to court action, rather than keeping diagnosis and placement disputes confined to administrative hearings and appeals. Informal parent participation before Judge Becker's court was persistent and lengthy.

The implementation of PARC is a mixed story. PARC has notably forced the commonwealth to offer an education to previously excluded children. PARC also increased the attention paid to special education and turned the court into a powerful political forum, thus substantially reshaping the political process. And the suit has served as a model for litigation in other jurisdictions. Yet the litigation has immensely complicated the jobs of educators and bureaucrats in Pennsylvania by reducing their discretion and hindering their willingness to take the initiative; that may result in a less than whole education.

Reform litigation or its threat has political consequences, and the efforts of legal reform groups and the federal courts to remake

special education has stimulated changes in school policy and even legislative reform--both in Pennsylvania and elsewhere.

V. The Jose P. Decision: Reforming Special Education in New York City

New York City is known as an innovator in special education, having offered classes for its handicapped children as early as 1909. After World War II the New York City Board of Education pioneered the establishment of special day schools for the socially maladjusted and emotionally disturbed designed to return these students to regular schools.

New York state also moved to address the educational needs of the handicapped. In 1957 it directed that each of its cities provide a "suitable" education for such children based on each child's individual educational needs and it empowered local school districts to contract with private schools to educate handicapped children under certain circumstances. This commitment had wide impact. In the next decade, scores of cities and towns in the state offered handicapped children educational opportunities in public or private schools.

Yet by the 1960s, education for the handicapped in New York City was in crisis. Several studies described the various problems in the special schools of the city and recommended changes in its special education programs. In 1965 a group of parents and educators charged that classes for the retarded and maladjusted children were dumping grounds for minority and problem children. The special schools were also repeatedly criticized for their physical inadequacies, the mislabelling of students, and the failure of the city to "mainstream" handicapped pupils. For brain-injured the problem was the reverse: little access. Though New York City had more than 130 classes for its 745 brain-injured children, more than 300 brain-injured children were on the waiting list for those classes in 1969.

Resort to the Courts

Parents of handicapped children in New York City, like those in Pennsylvania, had long been active in promoting special education reform, and in 1969 some parents of brain-injured children complained to attorneys about the lack of classes for their children. These attorneys, members of several public interest law firms, brought a class action suit on behalf of the "brain-injured" or otherwise neurologically impaired children, charging that the long waiting lists constituted a denial of equal protection by the New York City Board of Education. The suit, McMillen v. Board of Education,[1] never went to trial, but it focused attention upon the city's failure, with the waiting list now numbering approximately 600 children, to place handicapped children in appropriate classes suitably and promptly. A class action lawsuit lodged in federal court, Reid v. Board of Education,[2] sought to remedy the problems posed in McMillen. Because the Reid court asked for clarification of several issues of state law, the plaintiffs filed a class action administrative proceeding in 1972 before the New York State Commissioner of Education to secure educational services for all unserved handicapped children, not just the brain-injured.[3].

During the next few years, the Commissioner of Education repeatedly found that the New York City Board of Education had failed to evaluate its handicapped children promptly and place them in suitable classes. Deficiencies were found in examination and diagnostic procedures, in the failure to place handicapped children in special programs, and in the lack of

space in city schools for these programs. The commissioner concluded that the inadequate educational programs for the handicapped resulted in large part from the fact that the school board had not provided adequate physical facilities and staff for needed educational services. He ordered that children already diagnosed as handicapped be immediately placed in an appropriate public or private school class. Furthermore, he directed that the board submit a plan to eliminate the waiting lists by 1974.

During this phase of the controversy over special education in New York City, the federal government also addressed the issue of education for the handicapped. The Education for All Handicapped Children Act (P.L. 94-142), established the right of all handicapped children to an "appropriate education" as close to the educational mainstream as possible.[4] That federal law greatly strengthened the hand of those pushing for handicapped student rights in New York City.

A legal interest group long active in school litigation in New York, the Brooklyn Legal Aid Society, subsequently joined the National Association for the Advancement of Colored People (NAACP), to file a class action suit on behalf of parents of black and Hispanic students. This suit, Lora v. Board of Education,[5] alleged that minority students had been discriminatorily assigned to special day schools. These public day schools had become racially segregated because white parents, but not minority parents, had manipulated bureaucratic procedures to gain private school placement at public expense. Minority parents remained poorly informed of the right to challenge improper placement.

The plaintiffs in Lora argued that vague placement criteria and discriminatory practices also led to this disproportionate use of public day schools by minority students. Several schools lacked adequate facilities, staff and instructional materials, and the system's evaluation practices and the due process protections for the handicapped, said the plaintiffs, violated state and federal law.

In 1978 Federal Judge Jack Weinstein, although commending the city's considerable efforts on behalf of emotionally disturbed students, held that not even its fiscal crisis could justify the city's neglect of special education. A year later he issued a remedial order to redress the violations. Weinstein directed that the city print and distribute a parents' booklet informing more parents of their children's rights; he ordered the city to start a training program for school personnel on special education laws, and ordered it to use non-discriminatory criteria and procedures to evaluate handicapped children. The Second Circuit later reversed Judge Weinstein's finding that the city practiced intentional racial segregation, but left the balance of Weinstein's findings in effect.[6]

By that time pressure on the board of education,had increased, as the the Puerto Rican Legal defense and Education Fund brought suit against the city. The consent decree in the case, Aspira of New York v. Board of Education,[7] ordered the city to identify and evaluate all children of limited English proficiency and to provide them with an appropriate bilingual education. The city failed to meet the requirements of this decree in the next few years.

Meanwhile, attorneys for the parents in Reid tried to pressure the city to place handicapped children from the waiting lists. One tactic they

attempted was to force the city into action by asking that the Board of Education convene individual due process hearings for each child on the waiting list, an enormous undertaking that would have cost the city $500,000 to complete. In requesting those hearings counsel anticipated that the city would make procedural errors many of the hearings which then could be challenged in the courts.[8]

New York State Commissioner of Education Ambach observed in 1977 that long waiting lists "remain a chronic problem that has worsened," and ordered the Board of Education to keep its evaluation and placement offices open throughout the summer in order to process the individual requests for placement. Despite that order, the city closed up shop at the end of the school year in June, the commissioner finding in September 1977 that the closing demonstrated the board's unwillingness to process handicapped children more quickly. The city was apparently unwilling to eliminate the waiting lists.

Commissioner Ambach asked that the board evaluate the children on these lists within 30 days in order to to hasten suitable placement. If the city was unable to do this, the Board of Education would then be held accountable for absorbing the costs of placement of children, at parental option, in a private school. The Commissioner also ordered the board not to transfer students to public school from private schools unless the private placement was found inappropriate. He also directed the city to submit a new plan for eliminating the waiting list by early 1978. In October 1977 he reiterated the obligation of the city Board of Education to evaluate handicapped children

within 30 days of notification to the board and of their duty to place those children within 30 days after that evaluation.

The city submitted a plan for the elimination of waiting lists in early 1978. But the Reid plaintiffs faulted it for vagueness and made the unprecedented request that Commissioner Ambach take the city's Division of Special Education out of New York City's hands and place it in receivership, because the board of education had proved itself incapable of running the division. The Civil Rights Office of the U.S. Department of Health, Education and Welfare also got into the fray. In June 1978 the Board of Education concluded an agreement with HEW to offer students on the waiting list until January 1, 1979 an appropriate placement within 90 working days. Students on the list after that date would be placed within 60 days.

That same June the board submitted yet another plan to Commissioner Ambach, but Ambach objected to the plan for failing to help a sufficient number of students. Meanwhile, the number of unserved children continued to mount. A report published by the city in November said that 8259 children were awaiting evaluation, 30 per cent of whom had been waiting more than 60 days. When, in January 1979, Commissioner Ambach found that the city board had failed to live up to its agreement with the Office of Civil Rights, the state threatened to withhold $7 million in education funds. A few days later, the city submitted to the Commissioner yet another a new plan to eliminate the "backlog" of waiting list cases by that August.

Criticism of New York City's special education efforts did not come only from the courtroom, Washington, or Albany. A consultant to the city's schools found in 1978 that there were 9000 empty seats in the city's handicapped

classrooms, even as thousands of handicapped children remained uneducated. This report also assailed the poor management of the Division of Special Education and the Division of Pupil Personnel Services. School Chancellor Frank Macchiarola pledged to speed up placement of handicapped children even as he expressed his concern about the high cost of special education--estimated by the city's Financial Control Board at $40 million greater than originally expected.

The Courts Break the Impasse

By the spring of 1979, the educational advocates had given up on securing relief from the state education department--its admonitions had produced no results--and began preparing lawsuits against the New York City School Board. Brooklyn Legal Services was primarily concerned with eliminating the waiting lists. Its suit, Jose P. v. Ambach [9] was filed on behalf of all handicapped children living in New York City who had not been promptly evaluated and placed in a suitable educational program.

A second case, United Cerebral Palsy (UCP) of New York v. Board of Education, [10] was filed on behalf of all handicapped children whose handicap resulted from brain injury or other nervous system impairment. Since UCP felt that the entire system of special education was inadequate, it raised many issues concerning the quality of facilities for non-ambulatory students, the adequacy of the individual education plans (IEPs) prepared for each handicapped child, and the unavailability of mainstream opportunities for handicapped children already in separate classes.

A third case, Dyrcia v. Board of Education,[11] was filed in October 1979 by the Puerto Rican Legal Defense and Education Fund, the organization behined the Aspira suit, on behalf of Hispanic children in New York City who were handicapped and of limited English proficiency, and who had not been evaluated or placed in appropriate bilingual special education programs. The Dyrcia plaintiffs argued that the city had violated the Aspira consent decree by failing to provide bilingual special education to those Hispanic children.

None of these three lawsuits was fully litigated. In a hearing before Federal Judge Eugene Nickerson, the New York City Board of Education in effect threw up its hands, admitting its failure to evaluate and place handicapped children in a timely manner. The court concluded that the city had failed to comply with the statutory requirements concerning special education. Given the "polycentric nature of the problem," said Judge Nickerson--a complexity due partly to the complex bureaucratic structure involved in the evaluation and placement process--the judge appointed a retired former colleague from the bench, Marvin Frankel, to preside over negotiations for a remedy. Judge Nickerson later ordered the comprehensive overhaul of special education in New York City.

The plaintiffs and the city agreed on deadlines for eliminating the waiting lists--a familiar enough process. This time, though, personnel were to be hired to help the city meet those deadlines. The agreement also outlined a new decentralized organizational structure for the delivery of special education services, borrowing from a plan drafted by the city's new executive director of special education, Jerry C. Gross.[17] Further,

Nickerson's decree outlined procedures to assure parental due process rights, presented a plan for making facilities accessible to students, and set forth a detailed outline for the provision of a continuum of special services, staffing, and "mainstreaming" opportunities. In February 1980 a consolidated judgment--combining Jose P., UCP and Dyrcia and incorporating the most important elements of the Jose P. consent decree was entered by Judge Nickerson.

The city defendants accepted the plan grudgingly, for its officials thought that implementing the Jose P. decree would cost too much--about $350 million according to the New York City Board of Education.[13] Mayor Koch faulted state and federal governments for requiring that services be provided for children and then refusing to help the city pay for them.[14] He suggested that the high cost of special education might necessitate reducing support for the education of ordinary students. Nonetheless, the city was obligated to comply with the consolidated judgment, and it set out to provide services to those children still on the waiting lists.

Implementation of the Judgment: Continued Litigation--and Controversy

Despite the promise of the 1980 order, subsequent years since the Jose P. decree have been characterized by the same pattern of interaction between state and litigants that has prevailed foer a decade: "procedural delay; followed by promises, agreements by the Board to comply with the admitted legal obligation promptly to evaluate and place handicapped children; followed by the Board's failure to evaluate and place handicapped children."[15] This

nailure has been aggravated by administrative instability in the Division of Special Education. The division received a new director, Dr. Allen Gartner, in the summer of 1981, after Dr. Jerry Gross was fired by Chancellor Machiarola amidst accusations that he was a poor administrator. Gartner, in turn, resigned in the spring of 1983, citing his belief that court orders were beginning to hurt the city's handicapped children.

The implementation process has been supervised not by Judge Nickerson, but by the Special Master Marvin Frankel. Frankel continued to monitor the case after the the signing of the consent decrees and presided over the negotiation by the parties of continuing points in dispute. Judge Frankel brought to his job both skill in promoting successful negotiations on complex issues, a trait admired by all parties in the suit and a thorough knowledge of the workings of the New York City school system, for he had been the presiding judge in other school suits.

A pattern of oversight quickly took shape. After the parties in the suit negotiated disagreements about implementation issues, they would report to Judge Frankel at conferences attended by lawyers in the suit,[16] and then attempt to settle remaining differences. The parties would then list the issues which were still disputed and at such meetings, Judge Frankel would discuss these issues with the parties in a way reminiscent of Judge Becker's informal oversight of the PARC case. Often Frankel would propose solutions, and by the end of these sessions, and ad hoc resolutions often would emerge. Sometimes informal negotiating would continue, often without the need for formal decisions from Frankel or Judge Nickerson. By the spring of 1982, only two of hundreds of legal and educational issues raised before Judge Frankel

had not been resolved by the parties through this process: the state's responsibility for future compliance failures by the city Board of Education and the question of whether the "preventive services" for children who had not been diagnosed as handicapped were a mandatory aspect of the continuum of services described in the original decree.

This transformation of the court into a forum for settling a large number of special education problems is made possible by the open-endedness of reform litigation once the court has retained jurisdiction to insure implement the reform decree. Providing education to handicapped children is an enormously complex enterprise that requires the cooperation of many city departments and the application of a very difficult body of knowledge. Issues involving student evaluation can only be addressed if there are enough trained personnel to perform such evaluations, and hiring such personnel depends on the city being able to afford it. Thus, reform suits raise issues that are part of a larger web of problems concerning the delivery of public services. Courts that seek to solve one problem almost inevitably are forced to try to solve problems of personnel management and public finance.

This "polycentricity"[17] is one of the principal features of the issues raised in reform litigation. That a court has a legal mandate to improve a service almost inevitably means that it will try to change those aspects of finance and governance that make possible delivering that service also means that plaintiffs can raise issues before the court that are only tangentially related to the original suit.

Despite these considerable achievements, the city has had trouble complying with the Jose P. decision, difficulties which Judge Nickerson has

admitted are due to bureaucratic obstacles and not willful resistance. Since the lawsuits filing, the number of children enrolled in special education classes has increased almost fifty percent, from 50,000 students in 1978-79 to about 100,000 1983-84.

The meaning of the changes in the number of children remaining on the waiting lists is less clear. The number awaiting evaluation has decreased substantially while the number awaiting placement has risen. The school board has attributed this change to its attempts to comply with Judge Nickerson's orders. The court order forced them to identify and evaluate new handicapped children, which in turn meant that more children were placed.

Reforming New York City's special education program has been plagued by administrative difficulties unanticipated in the 1980 decree. A shortage of special education teachers in New York prevented many handicapped children from attending classes, a situation critics blamed on the State Board of Education for its failure to give appropriate licensing exams. Some children are placed in the wrong classes. The city hopes to ameliorate these problems by asking the state for permission to increase class sizes.

The move toward decentralizing the special education bureaucracy, first proposed by former Director Gross, is incomplete. The defendants have made strenuous efforts to comply with the court reform decree--a fact admitted by the plaintiffs--but court-mandated services are still being denied to many of the city's handicapped children.

The state of New York, like the Pennsylvania authorities in the PARC case, is trying to force compliance with the Jose P. decree, and has had only minimal success. For example, the state put pressure on New York City by

witholding special education funds. Because of discrepencies between the lists of handicapped children compiled by the city and those developed by the state, for example, about $120 million in state aid to the city was withheld during 1979-80.

The plaintiff's strategy for implementing the consolidated judgment has importantly shaped the course of special education policy. Plaintiff lawyers first decided to address the question of the waiting lists, anticipating a subsequent shift to more substantive educational issues such as staffing ratios, instructional methods, provision of related services, expansion of mainstreaming opportunities, and building accessibility. Addressing these issues was especially important because many problems associated with special education in New York City went beyond the waiting list question and involved critical structural problems in existing special education programs and related services.

But waiting list difficulties remain a preoccupation of many people participating in the suit. Many children were placed incorrectly and in 1981 Special Education Director Allen Gartner admitted that 12,684 handicapped children were still not evaluated or placed at all. These problems caused the plaintiffs to postpone addressing such issues as educational quality; the court has not sought to address these issues on its own, leaving to the plaintiffs the responsibility for controlling the evolution of the suit.

The few issues of educational quality that have been addressed remain unsettled. The city's comprehensive plan to deal with some of these issues was submitted to the court several months late and not incorporated into the Jose P. judgment until over a year later. Disagreements among parties to

the suit became exacerbated in 1982 as the difficulties in compliance became more obvious and the plaintiffs began to press the court to take action on some quality issues.

In February 1983, Judge Nickerson's patience ran out. He found the New York City system in contempt of court for failing to comply with his order that all handicapped students be provided with a special education program in a timely manner. "All parties agree that as a result of this litigation, improvements have been made in according handicapped children their rights," Judge Nickerson stated, but compliance with the decree has not yet been achieved. Nonetheless, the judge refused to order the system to hire 400 more people (at a cost of $20 million per year) in order to provide adequate support. He also refused to hire an independent data consultant to help the court monitor the school system, as requested by the plaintiffs. Meanwhile, special Master Frankel continued to preside over conferences designed to settle many of the compliance issues.

In 1983 New York City school officials informed the Koch Administration in November that they would need an extra $80 million by the end of the school year to meet unexpectedly high education costs. Approximately $50 million of the requested sum was necessary to pay for higher than expected costs for special education. During the summer of 1983 the a backlog of 22,00 students awaiting evaluation was significantly reduced, but many of those processed were placed in separate, day-long classrooms that are expensive to operate. A total of 107,000 students were classified as special education students in 1983. The city's special education budget for 1983-84 was expected to be more than $450 million.

Mayor Koch has labelled the city's special education effort a failure, and called for the establishment of a special commission by the state of New York that would "examine what we're getting for our money." [18] The system, he claimed, was unsuccessful in moving handicapped children away from special classes and into regular classes. The cost of special education to the city in 1983-84 was $576 million. more than 17 per cent of the city budget. The amount was expected to rise by $30 million more in 1984-85.

Conclusion

The supervision of special education in New York City by the federal court, which began in 1980, shows no signs of ending. The rapidly growing numbers of students needing services mean that a premium is put on the mere processing of their cases, not tailoring assignments to individual educational needs. In March 1982 Special Master Frankel stated that he had no idea when the oversight would or should be ended. "I had imagined that it would be over before now. As time goes by, however, the plaintiffs seem to generate new issues, many of which seem to be substantial. I don't know whether the termination of the court's involvement can be measured by any specific quantum of 'threshold of change.'"[19]

Part 2:

Impact: Special Education Reform in New York City

The United States District Court for the Eastern District of New York entered a comprehensive judgment in 1979 to remedy a ten year history of the denial of services to handicapped children by New York City's Board of Education.[20] The court required that the city school board make available, on a timely basis to all handicapped children in the city between 5 and 21 years of age, a free, appropriate education with appropriate related services in the least restrictive environment.

This judgment had four substantive requirements: the elimination of illegal waiting lists by April 1, 1980, through suitable evaluation and placement of students; provision of all related services, such as speech and language therapy, individual and group counselling and physical

therapy, to children as required by their IEP; modification of school buildings for accessibilty to the handicapped; and provision of a full continuum of educational services, including procedures for mainstreaming opportunities, plans for instructional supplies and equipment.

The reform decree also contained various procedural requirements, including the evaluation of each child within 30 days, initiation of outreach efforts to insure that all handicapped children receive services, participation by parents in School Based Support Teams (SBSTs), distribution to parents of parental rights booklets, compliance with court-imposed reporting requirements including a district-by-district census of handicapped children, filing of compliance reports in several languages, preparing a plan for implementing the judgment by the New York City School board, compiling of data in a management information system, and submission of documents to the court on medical reviews; instructional supplies.

Although the school board of the city of New York has only partly met the federal court orders concerning special education, as in the PARC case, the litigation has wrought significant changes in some aspects of the program. Special education is now an issue on the public agenda in the city, and the litigation has altered the process of policymaking significantly. But also, as in Pennsylvania, the litigation has caused adminstrative turmoil. Most damningly, it has failed to address in any substantial way issues of educational quality.

Determining the changes in the quality and efficiency of special education services since 1980 is more difficult than data on enrollment--in part because the focus of the Jose P. litigation has been on expanding the size of the population offered services by eliminating the waiting lists. But the task also has been difficult because of the difficulty of achieving that goal through the application of legal rules and procedures.

The impact of the Jose P. litigation on the school bureaucracy in New York City has been significant. The bureau in charge of special education, the Division of Special Services has been decentralized in response to the lawsuit, yet its size has grown and the autonomy traditionally enjoyed by its personnel has been reduced. However, several provisions of the Jose P. consent judgment have been difficult to put into practice. The standard operating procedures of ther bureaucracy have been difficult to change and factors beyond the control of the court have frustrated reform efforts.

Impact: Services

By 1982, three years after the entry of the consolidated judgment in the Jose P. litigation, special education services were delivered to more students in the city of New York than ever before. Although the number of pupils enrolled in the New York City public schools between 1978 and 1983 declined 11.4 per cent, special education enrollments (both full-time and part-time) increased by over 120 per cent during the

same period. In 1978, before the plaintiffs filed the suit, about 45,000 students were enrolled in New York City's special education classes or were receiving services of some kind. By 1983 the total had exceeded 100,000. The figure also is impressive when compared to the size of special education enrollments in other cities in the nation:

> The number of special education students in New York City is five times greater than the number of special education students in the next four largest cities in the state combined. The increase in the number of students served by the Division (of Special Education) between 1978 and 1981 is greater than the total number of special education students in all but the five largest cities in the nation. If the Division of Special Education were an independent school system, it would be the [sixteenth] largest in the country, or approximately the size of the entire school system of the city of Cleveland.[21]

Despite this significant growth, many students remain on waiting lists for special education services: the waiting list delays have apparently shifted to the placement phase. When the Jose P. suit was filed there were 2500 students who had been on the waiting list for more than 60 days. By September 1980 that number had decreased to about 600. In early 1979 there were 2765 children awaiting placement; in September 1980 that figure had increased to 7,500. "One is tempted to conclude", wrote plaintiffs' lawyer Michael Rebell, "that 2500 youngsters have been speeded through the evaluation process only to add to the waiting list at the placement end of the spectrum."[22]

The rapid growth of the defendants' special education effort occurred despite the the continued failure of the city to provide the services called for in the original judgment. New York City did not

offer resource rooms for each handicapped child who needed such help and was repeatedly late in complying with court requirments for plan submission.

Some of the procedural requirements of the judgment have been not been met. These requirements include meeting evaluation deadlines, securing parent participation in the evaluation and placment process, the completion of a citywide census of handicapped children, and the timely submission of compliance reports. "Serious" problems still exist in the preparation of IEPs, the provision of mainstreaming opportunities, and the provision of related services such as physical therapy.[23] As plaintiff's lawyer Rebell concluded after examining the city's attempts to comply with the judgment, "ample facts obviously exist to support both the traditional defendant arguments that superhuman efforts have been made and the traditional plaintiffs perspective that necessary services are being denied on a wide-ranging basis and the system remains in violation of the law."[24]

The former Chancellor of the New York City public schools, Frank J. Macchiarola, defended the efforts of the city to comply with the provisions of the Jose P. court orders.[25] Macchiarola attacked the litigation process itself for causing "significant harm" to the best interests of the handicapped in New York City. This damage could be traced, he said, to the court's excessive reduction of the discretion possessed by special educators, an overemphasis on timeliness of compliance to the exclusion of other equally important values, and to judicial unfamiliarity with the field of special education, a

nnortcoming which has "crippled the capacity of the city to innovate and to modify policies in the light of increased experience".[26]

Macchiarola believes that many of the issues that were on the special education agenda of the city defendants were policy decisions that required the application of professional judgment not possessed by the courts or the lawyers working on the case. These issues--for example, determining the appropriate educational regimes for children with learning disabilities--require judgment, professional expertise, and flexibility if they are to be resolved--values that were undermined by the law's preference for procedural rule and uniformity of outcome. Such rigidities, according to the Chancellor, make it hard to meet the prescriptions of the Jose P. remedial decrees; they also make it hard to meet the broader special education mandate that each child receive an educational regime tailored to his needs.

Impact: Bureaucratic and Administrative

The schoo system abandoned its traditional multi-layered structure of special service delivery so that it might conform to Jose P. and to the requirements of PL 94-142 that there be a continuum of services provided handicapped students, strong support for classroom teachers, and programs organized around functional needs rather than handicapping labels. The new structure, outline by former director Jerry Gross, focused on School Based Support Teams (SBSTs) to deliver educational

services, as well as on teacher training, and more cooperation between special education and mainstream educational staff.

The Lora decision, peripherally related to Jose P., contributed to these administrative changes by stimulating the establishment of an office of student advocacy for special education, which was made part of the office of the Chancellor. Members of that office advised Chancellor Macchiarola on special education issues, and also advised parents regarding their rights and the special education services available to their children. The advocacy office also served as an ombudsman, handling problems and inquiries pertaining to special education.

Jose P. has directly led to tremendous growth in the size of the personnel devoted to educating the handicapped in New York City. In 1978 there were 5224 teachers in special education classes and resource rooms around the city. Three years later the number had increased by 81 per cent, to 9447. By September 1980 the city had 420 School Based Support Teams in place around the city, only 30 short of the number required by the consent decree.

The litigation also forced New York to rethink the traditional distinction between special education and regular education. Principals and teachers were formerly responsible to their school district superintendent. Special education staff were responsible to the central division of special education. School principals had little authority over special education personnel and could not use such staff in the manner they considered educationally effective. Under this approach the division of special services could not require regular education staff

to adhere to special education procedures and priorities, a division of organizational responsibility that frustrated the integration of staff and services into the organic life of the schools." Five experimental programs were established, in the aftermath of Jose P., to integrate social and regular educational structures at the district level.

Not all of these administrative changes have been for the good. According to the New York City Board of Education, the judgment has had several pernicious administrative consequences, prompted mostly by the outright conflict between the values of legalism and professionalism. The specification of administrative detail in the court orders has converted "what should be routine administrative modifications in a conceptually sound program into tense and time-consuming legal issues."[37] Many decisions have to be screened for compatibilty with the judgment, reviewed by the counsel of the division and then by plaintiff's counsel, and implemented under the often skeptical supervision of opposing attorneys.

According to the defendants, the focus of the court on questions of timeliness in student placement and on absolute numbers of children served has obscured difficult questions regarding the school system's capacity to identify children in need of services, the effectiveness of the programs that those children are offered, and the feasibility of discovering other ways of meeting the educational needs of the handicapped. The attention given to timeliness, for example, has prevented the achievement of the goal that each child be given an

"appropriate education", because an adequate evaluation sometimes takes longer to complete than the time allowed by the court.

Organizational problems have been exacerbated by factors out of the control of the court and the defendants--indeed, matters that have been beyond the focus of the litigation so far. There are not enough psychologists and social workers and this has meant that SBSTs had to be assigned to mroe schools that desired by the court. Additional personnel shortages in other areas have frustrated achieving other court goals.

The defendants also have found fault with the educational assumptions underlying the consent decrees, which in this view inhibit achieving the goal of an appropriate educational regime for each child. The consent judgment assumes that special educators possess the expertise needed to identify and remediate all learning and behavioral difficulties. It prescribes rigid time limits and other quantitative measures of progress toward eliminating the handicap, when more than the 30 days specified by the court may be needed to complete the extensive observations of a child and the consultations with parents and staff that are needed to make a proper diagnosis. The defendants urged that incorporating any specific professional philosophy into a court order is unwise, since many handicaps are not conditions that a child does or does not have, but are functional in nature, rooted in relationships between a child and his peers, family or educational environment [16] Some handicaps such as speech impairments, deafness or blindness are

relatively easy to diagnose, but many others present more complicated diagnostic difficulties.

The court's judgment has also been faulted by city officials because it focuses on tangible, measurable outcomes. That a large number of students in certain categories, such as hearing impaired, can be identified, says nothing about the quality of the services they are receiving. And to emphasize the speed with which students receive services and the completeness of those services, is not always a sound practice. "In fact, quantitative measure of progress become counterproductive if stressed to the exclusion of other values embedded both in the law and in sound educational judgment"[28]

The stress in the consent judgment on "measurable progress toward compliance" has meant that many special education placements made by defendants are completed with little concern for appropriateness. Compliance in practice has usually meant elimination of the waiting lists, and the suit has stressed achieving that objective even if doing so would make it harder to achieve the goal of making "appropriate" placements for each handicapped child.

The problem of growing waiting lists is due partly to the differing perspectives school officials have about special education. Classroom teachers refer students who are not meeting expected standards of academic or behavioral development. Evaluators believe that a child's difficulties in school can always be explained by an identifiable category of handicapping condition, and recommend them for special education services. The result is an ever-lengthening list of students

awaiting placements. (Between 1979 and the following year, for example, special education referrals in New York City increased 45.7 per cent. This was the major source of new special education enrollments during that period.)

Court pressure on the schools to evaluate and place children in ways that will make compliance evident is understandable, for how else might reforms be measured in a system with a weak track record for success. But the focus on the quantifiable also may have regrettable effects. A New York state education official in charge of monitoring the city's progress toward compliance with the court judgments concludes that the pressure on public school teachers to refer students has resulted in extensive misclassification of school children.[29] When that fact is discovered, the children are referred again to the Division of Special Services and they go back on the waiting list. A site visit report conducted by New York state found that in one city district the evaluation procedures showed a particular potential for misclassification of bilingual students, and that the areas of speech, hearing and language assessment have been consistently overlooked--this despite the high level of commitment and dedication of school personnel to making the new decentralized model work.[30]

The Jose P. judgment has diminished the accountability of regular education officials for the education of all New York City school children because it has lowered the goals that parents and teachers have for the children who are their responsibility. Special education referrals serve as remedy for any educational difficulty. Regular

education staff are less inclined to believe that they bear some responsibility for the education of all children in their charge, despite developmental differences.[31]

The almost 200 specific requirements of the consent judgment, ranging from the rules governing the filing of complaince reports to placement procedures, have significantly reduced the discretion of the city's educational staff. Changes in any mandated procedures require court approval. The effect on administration is predictable: Even "the most minute modification in evaluation and placement must pass muster with our (i.e. New York City's) attorneys and with the plaintiffs representatives under the threat that any disagreements will be litigated before the Special Master and the Court."[32] The result is inflexibility and delay in the delivery of services to children:

> Educators are no longer free to exercise professional judgment in the discharge of their duties. Instead, every contemplated change in educational practice must be weighed to determine if it will survive the legal gauntlet it will be forced to run and, if it can, whether the benefits it is likely to produce will outweigh the burden of winning its approval. Changes and innovations that survive this initial test are not judged on their educational merits alone. Instead, they become bargaining chips in a lawyers' game of chance. The outcome of this process is not determined by the educational interests of handicapped children but by the litigation interests of laymen.
>
> In any field the necessity of negotiating and litigating questions of professional judgment and expertise would cripple an organization's capacity to adapt to fluid and changing circumstances. The impact of the judgment in the present case is even more severe because of the nature of the subject matter involved. There is little professional consensus, much less empirical proof, on most issues of special education policy, procedure and implementation. Defendants can offer only professional judgment, not hard data, in support of their belief that particular practices or

> procedures are unsound or unworkable. The judgment creates a presumption in favor of the status quo and places the burden of proof on defendants to justify departures from it. This burden can rarely be carried, with the result that the Division of Special Education remains frozen in place, no matter how strongly the experience and professional judgment of defendants changes.[33]

Jose P. spawned a system for processing the cases of large numbers of New York City school children who have trouble achieving by "normal" standards. Some of these children do not need special education services. Other possess maladies or backgrounds that result in learning difficulties that cannot be easily identified through the application of a recognized body of professional expertise: Handicaps such as "learning disabled" and some emotional difficulties, for example, are poorly defined and understood. Still other children do possess readily identifiable handicaps. Pressure from the court and the plaintiffs on the city to eliminate the waiting lists has discouraged a sufficiently thorough inquiry into the qualitative aspects of the education New York City's handicapped are receiving.

The Jose P. consent judgment has also made special education immune from the normal processes of bargaining in which competing financial and policy priorities are debated and resolved,[34] The utility of the School Based Support Teams, for example, cannot be openly discussed because they are cemented into the consent judgment, part of the package of legal "rights". And the the judgment also has diverted much of the attention of the staff in the special education division away from their educational duties and toward legal matters. In 1982,

Chancellor Macchiarola estimated that 20 per cent of the time that he and his staff spent on official duties was devoted to litigation against the Board of Education.[35] Dr. Gartner later resigned as head of the special education division because he thouight that the presence of the court had grown counterproductive. This preoccupation with litigation seems to characterize bureaucracies subject to court reform decrees.

Fragmentation of responsibility among different levels of government has made complying with the reform decree difficult. The state of New York and the federal government have been unable to give the city the fiscal help it believed necessary to pay for the costs of complying with court decrees. The state of New York has exacerbated the situation by its unwillingness to help the city hire new qualified special education personnel. City officials claim the state has preferred to play a role as a monitoring agency without assuming primary responsibility for special education.

Impact: Political

The special education litigation in New York City has had extensive effects on special education politics. The controversy aggravated old political tensions between New York City and the state in much the same way that the PARC controversy kept hostile the relationship between educators in Philadelphia and at the state level in Pennsylvania.

Nonetheless, special education is now an important issue on New York's educational agenda and on the city's broader political agenda. After years of giving little thought to the needs of the handicapped, the defendants now see special education as "the focus of innovation and challenge." Despite legislative and court mandates, the Board and the Chancellor now give high priority to special education issues. Many educators welcomed the lawsuit, despite the many continuing problem areas, and since 1979 the educational system in New York City has responded to special education problems. This has occurred in the face of Mayor Koch's antagonism toward spenting large amounts of money on special education and the belief showed by many that too many resources should not be diverted from "regular" education".

The Jose P. litigation, in fact, has led to a significant increase in the amount of money spent on special education. In 1979-80, the first full year after the court decision, the per pupil amount spent by the city rose 25.6 per cent, four times faster than the previous year, while the regular education budget was rising only one-third as rapidly.

The suit also forced the city to spend a greater proportion of its education budget for special education. In 1984 the Division of Special Education consumed 17 per cent of New York City's total budget for education-- a jump from 7.6 per cent since the court order. In order to implement the departmental reorganization embodied in the consolidated judgment and to reduce waiting lists, the Board of Education received an additional $26.7 million in 1980. Other expenses

associated with implementing the judgment cost an additional $19.9 million in that year alone. New York estimated that most of the $96.9 budget deficit incurred by the Board of Education in 1979-80 was the result of increased special education costs attributable to the Jose P. ruling. Much of the anticipated shortfall expected for the 1984 fiscal year is due to high special education costs.

The 1981 executive budget of the city of New York requested more than $118 million in additional funds for special education, an increase of 65.5 per cent over the previous year. Other expenses related to special education requests that year totalled $299 million for direct instructional and support services, $8.7 million for additional costs attending the implementation of the SBSTs,and $64 million for new programs.

The budget message gives additional insights into the size of the city's special education effort in the wake of the Jose P. ruling:

> The projected register increase in special education has implications beyond the special education budget, since State law requires that handicapped students be provided free transportation to and from the schools they attend. The 1981 budget for pupil transportation is $204.9 million, a $41.4 million increase over the 1980 modified budget. Of this amount, $106.2 million, or approximately $670 per student, is required to transport students with handicapping conditions. This includes $26.5 million for compliance with local legislation requiring an escort on all vehicles transporting handicapped students. The balance of the appropriation, $98.7 million, is used to reimburse the Transit Authority for free and reduced fare passes and to provide contract busing services for non-handicapped and open enrollment students.
>
> The costs of providing transportation services have risen dramatically in the past few years. Since 1972 the average annual cost of a standard bus has more than doubled. At the same time, the escorts' average daily wage rate has increased

by more than 50 per cent, from $45.00 in 1972 to $67.59 in 1981.[36]

The 1984 special education budget, $576 million, is more than twice that spent for special education in 1978.

Impact: Process

Jose P. wholly revamped the process of policymaking in New York City special education. The delivery of special education services is now subject to the oversight of the plaintiffs, their attorneys, and the courts. Educational entitlements have been defined as legal rights that the city of New York must provide, and the settlement contains numerous procedural guarantees.

In this policy mix much influence now is wielded by interest groups that champion the cause of handicapped rights. These groups have been the most important determinants of the course of the litigation. Advocacy groups such as United Cerebral Palsy and Brooklyn Legal Services which first brought the suit in court, have remained major participants in the policy process even after the supposedly "final judgment". They also have bargained with the city defendants about outstanding implementation issues. Many individual parents themselves remain active in special education in New York City.

Consequently, much of the policy "action" has shifted from the school board to the courthouse and the judge's chambers. The plaintiffs attorneys exert substantial power by threatening new legal action. And

nnrents' associations bring special education complaints to the court--even those only indirectly related to the original lawsuit. This transformation of the court into a general problem solving forum also occurred during the PARC litigation.

This high level of interest group activity makes it hard for a court to disengage from a case. With any government policy that confers benefits, client groups enjoying entitlements or newly won poltical power prevent the government from withdrawing or significantly reducing those benefits once a program is in place. In this respect court action reforming social services is like any other affirmative policy. The lengthy implementation phase of institutional reform litigation is evidence of the existence of powerful incentives for legal reform groups to use reform litigation to further their own role in the process of special education decisionmaking.

VI. Rhem: The Reform of the New York City Jails

Part I: The Litigation

The Manhattan House of Detention, known by its grim nickname, the Tombs, was built in 1941 to replace the original century-and-a half old Tombs jail long criticized for its overcrowded and substandard conditions. The new Tombs was a 12 story maximum security institution with a capacity of about 9000. It was declared "escape proof" and highly praised as a model penal institution. Most of its inmates were unconvicted detainees awaiting trial.

Yet only a few years after its completion, this new jail became outmoded, emulating many of the failings of its predecessor: overcrowding and poor sanitary and health conditions. Too many inmates, said some observers, were educated in crime "during close contact under unnatural conditions amidst demoralizing idleness" at the institution. Sometimes three inmates in the Tombs were housed in a single 5' x 8' cell, and they lived surrounded by constant noise.

A number of inmate suicides occurred in the Tombs and in other New York City jails in 1969. State legislators, civil rights groups and prison and law enforcement officials blamed jail conditions for the deaths. They questioned the city's ability to improve overcrowded conditions. State Senator Jonathan Dunne, then chairman of the Commission on Penal Institutions of the New York Senate, visited the Brooklyn House of Detention and remarked on the jail's inhumane and "clinical" approach to its inmates.

Problems persisted, despite the claims of the New York City Commissioner of Corrections that the corrections department was trying to reduce the number of suicides and that the rate in New York City jails was comparable to suicide

rates in other jails in the state. More than 1000 inmates of Riker's Island jail were transferred to the Clinton State Prison in Dannemora, New York to ease the overcrowding. Early in 1970, Senator Dunne found that filling the city's pretrial detention centers 60% above their intended capacity was inhumane to prisoners and drained the capacity of the professional staffs. Others cited additional problems in the correction department. Some faulted corrections officials for introducing oral as well as written tests for wardens, a device which kept on the job provisional wardens less able to solve prison problems than more experienced wardens. The jail crisis was exacerbated by the indictment of four corrections department officials accused of perjury and attempting to conceal their improper conduct concerning the death of an inmate.

Suggestions for a new house of detention were rejected by the New York City Planning Commission, which said that building a new jail was the wrong approach to the overcrowding problem. The overcrowding statistics were indeed grim: the city jails housed almost double their original capacity of 7,993 inmates. A survey of 907 inmates in the Manhattan House of Detention revealed the wretched living conditions of inmates: fear, violence, filth and degradation were widespread. Shocked by his 1970 visit to the jail, U.S. Senator Charles Goodell publicly asked for a doubling of the $61 million New York City corrections budget in order to relieve the congested conditions. But New York City lacked the needed funds and New York State refused to bail out the city.

A riot occurred at the Tombs in August 1970. Rioting inmates had many grievances, including overcrowding, lack of jail programs, discriminatory bail

practices, excessive court delays and unfair disposition of cases. Earlier in the year correctional officers themselves had posed some of these grievances when they picketed City Hall, and the New York City Commissioner of Corrections depicted the Tombs as being the ideal breeding ground for riots. Protesting the deplorable jail conditions, 94 inmates (one-half the total number scheduled to appear before court) refused to leave their cells. The state announced plans to shift 670 sentenced inmates to upstate prisons.

Violence continued. Early in October 1970 more severe riots occurred in the Tombs and five other city institutions, and five prison guards were taken as hostages until inmates were allowed to present a list of grievances to the press and to Mayor John V. Lindsay. Their complaints included charges of brutality by the correction officers, racism, bad food, highly congested living conditions and unfair pretrial detention.

Publicly acknowledging the existence of a "corrections crisis" in the city s jails, Mayor Lindsay again appealed to the state of New York to provide temporary prison facilities in order to help ease the situation. Lindsay also asked the courts to act to clear up the backlog of prisoners awaiting trial. One city corrections official commented that these riots in the city jails should signal the need for a "revolution in court administration" to speed up the cases being disposed of by the courts.

Keeping the pressure on the city, the state investigative committee headed by Senator Dunne issued another report in 1971 that listed the city's responses to its earlier recommendations. Although the committee had earlier found deficiencies in prison sanitation, shower and laundry facilities, food sources, and communications systems between inmates and their families, the

city had not adopted its recommended solutions. The New York City Board of Correction, a body established to oversee the corrections department, issued an "Agenda for Action" that borrowed many of the Dunne committee's recommendations.

Early in 1971 New York City sought state help in dealing with the city's penal institutions. One unsuccessful bill called for the state to lease to the city any unused state correctional facilities when the city's prison population reached its capacity.

But criticism continued. In March 1971, the New York City Criminal Justice Coordinating Council, in its first comprehensive study of to how the city's police, prosecutors, courts and jails were confronting crime, reported that the criminal justice system was neither efficient nor fair. In an unprecedented action, New York City Board of Correction, which monitored correections in the city, announced that it was suing to force the state and the courts relieve overcrowding in the city's jails, contending that this overcrowding violated federal law. The complaint charged that the state had the constitutional duty to provide adequate detention facilities, and that, moreover, under the current system, prisoners were being deprived of their freedoms without due process of law.

The storm of complaints prompted the New York State Corrections Commission to give New York City six months to improve the housing, health and educational conditions at the city jail on Riker's Island or face loss of state certification. In April 1972 William vanden Heuval, chairman of the Board of Correction (which monitored jail conditions in the city), called for a massive restructuring of the city's correctional system. The president of

the correctional officers union did his part by describing the city prisons as having attained "new inhuman levels of overcrowding." So did the prisoners, s, seven of whom made the first successful jailbreak from the Tombs since it opened three decades before. Responding to these developments, Mayor Lindsay declared that the city's correctional facilities would receive priority in the new capital budget for the city.

It is in this setting that in September 1970 the Legal Aid Society of New York, the largest public defender office in the country a federal class action lawsuit against the city on behalf of those inmates confined in the Manhattan House of Detention. The suit, brought under Section 1983 of the 1871 Civil Rights Act, alleged that city jail practices and conditions in the Tombs violated the inmates' constitutional rights. Violations of inmate rights were said to include overcrowding, excessive noise, mistreatment of inmates by correctional officers, arbitrary disciplinary procedures, inadequate medical care, lack of recreation, excessive restrictions on visitors, and censuring of mail.

Legal Aid's action was the direct result of the jail riots and the publicity they generated. Many Legal Aid attorneys represented inmates on other grievances and those lawyers saw at first hand conditions in the jails. They soon shifted their interest from litigating isolated grievances to improving the general conditions in the city's penal facilities. Having represented most indigent defendants in the jails, Legal Aid lawyers had an additional reason for selecting the Tombs as their "target" institution: things were worse there than in any other jail. If Legal Aid succeeded in the Tombs case, that ruling could be applied to other city jails. Alternatively,

the city might "get the message and [voluntarily] make improvements elsewhere."[1]

However, District Court Judge Walter R. Mansfield denied much of the relief sought by the plaintiffs.[2] Mansfield held that while "existing conditions at the Tombs were far from satisfactory,...they have not descended to a level proscribed by the Eighth Amendment." Judge Mansfield noted attempts by the city and state to improve conditions in the Tombs since the first disturbances. Some of the physical damage and prison tension was caused by the plaintiffs' fellow-prisoners, not city corrections policy, Mansfield held. The judge did order that Tombs inmates be afforded the opportunity to confer in private with their attorneys and that a more complete set of rules governing inmate behavior, lock-out times and procedures, and some other aspects of prison life be drawn up and distributed.[3]

Despite its defeat, Legal Aid kept pressuring the city of New York to improve the Tombs, negotiating an agreement designed to improve jail conditions, especially overcrowding, unsanitary jail conditions and inadequate medical care. On August 2, 1973, the federal court entered consent decrees giving the settlement the force of law. Soon the remaining issues were heard at trial before Federal Judge Morris E. Lasker.

Lasker's interest in the details of jail life was impressive. He toured the Manhattan House of Detention on two occasions and also visited the Federal Detention Center in New York City. He compiled a massive amount of data concerning lock-in practices, visiting conditions, program activities, employment of detainees, correctional officer staffing, inmate disciplinary rules, classification procedures and inmate correspondence. On January 7,

1974, Judge Lasker declared that the conditions at the Tombs "would shock the conscience of any citizen who knew of them", thereby violating the constitutional rights of its inmates.[4]

Lasker asserted that since most Tombs inmates were pretrial detainees rather than convicted criminals, they retained "all the rights of ordinary citizens except those necessary to assure (their) appearance at trial." The judge reminded the city that these detainees would not be in jail at all were it not for their inability to furnish bail. Noting that conditions in the Tombs were worse than those confronting convicted inmates in the state prisons. Lasker concluded that the conditions which provoked the 1970 riots still existed. The judge said that he saw no alternative to court intervention for improving conditions in the Tombs. Despite the warnings of many commissions, boards and reports, the city of New York and the other governmental branches had failed to correct its problems.

Judge Lasker ordered many changes in the administration of the Tombs. A new classification system was mandated to remove unconvicted detainees from unlawful confinement in maximum security. The excessively restrictive visiting privileges in the Tombs were to be relaxed. Lasker stated his intention to provide a plan for an optional inmate lockout system, and declared that he would undertake remedial efforts to improve inmate opportunities for physical exercise, to reduce noise levels in the jail and to secure inmate rights to a "tolerable living environment." The court ordered the city to add new in corrections personnel and upheld the right of inmates to be protected from harm. Disciplinary procedures were to be governed by due process principles, including written notices of charges and the right to

summon and question witnesses, and mail restriction were eased. Finally, Lasker ordered the parties to the suit, including the Legal Aid attorneys representing the plaintiffs, to prepare for a conference concerning how the changes at the Tombs would be put into effect.

Implementation: More Inmates and More Litigation

The court decision, one of the first federal rulings holding that environmental condtions in a jail, not just overcrowding, could violate inmates rights', encouraged the state and the Board of Corrections, the city department responsoible for jail oversight, to continue pressuring e on the city to make changes in the Tombs. The State Committee on Crime and Correction described the Tombs as an "architectural monstrosity," and recommended that it no longer be used as a facility for housing detainees. The state corrections commission released a report that assailed conditions at the Tombs and hinted that it might use its authority to close it entirely if the city did not begin improvements. The Board of Correction held a public hearing on the future of the Tombs in April 1974. The Board's report, released four months later, recommended that the Tombs be "closed, redesigned," and renovated to meet all constitutional requirements.[5] (The Board also suggested that other changes be made in the administration of criminal justice in New York City). The noise level at the Tombs was declared by the federal Department of Housing and Urban Development in the spring of that year to be excessive and HUD condemned the building for habitation.

Despite all this, the city, now headed by Mayor Abraham Beame, still resisted making major changes in the jail.

Six months after his first decision, Judge Lasker declared that the Tombs was uninhabitable and ordered the facility closed. He noted, however, that if the city submitted a plan for making necessary improvements, he would reconsider the decision. The city refused to send a renovation plan to the court, and for three months neither side backed down.

The impasse between the city and the federal court was broken on November 1974, when the city abruptly changed course. City Corrections Commissioner Benjamin Malcolm announced, to the surprise of many that the city would close the Tombs and the Queens House of Detention before the end of the year. The inmates of both institutions would be transferred to Riker's Island jail in the middle of the East River.

After the closure announcement, the Legal Aid Society again assumed the initiative. During the previous year they had filed a second class action suit on behalf of the inmates of the Brooklyn House of Detention, alleging that the courts, the Brooklyn district attorney, and the Department of Corrections were depriving detainees their of their right to a speedy trial, adequate counsel and reasonable bail. Suits challenging the constitutionality of the city's operation of its other jails were also filed by Legal Aid, with each suit seeking change in a single institution. These suits had significant political impact brcause the transfer of the Tombs inmates to Riker's Island had focused attention on the inadequate conditions at that institution and in the other city jails. The Tombs, meanwhile, was closed--apparently for good.

The legal maneuvering continued. Judge Lasker ruled that the plaintiff inmates who had been transferred from the Tombs to the city jail on Riker's Island were entitled to the same constitutional protections in their new jail that they had enjoyed at the Tombs.[6] Lasker again addressed a broad spectrum of issues: classification, lock-in time, access to counsel for inmates contact visits, and recreation. He ordered the corrections department to improve practices in each area, and also made minor alterations in his earlier remedial plans. Meanwhile, the Second Circuit affirmed Lasker's initial order and directed the city to begin compliance with his reform decree.[7] The decree was supplemented later by subsequent court orders. One, for example, enjoined the city from double celling-inmates in city detention facilities and ordered their closing unless conditions were improved.[8]

Although the city had shut the Tombs, debate over its ultimate fate continued. A Manhattan grand jury recommended that the Tombs be reopened for prisoners awaiting trial. Lasker rejected the city's proposal to reopen Tombs, citing the persistence of some of the problems that resulted in its 1974 closing. Nonetheless, he praised the city for its "dedicated effort" to improve the prisons, "while working with a regrettably limited budget."

Mayor Beame's administration seemed to resist attempts to improve conditions in the jails. Although the mayor seemed to support the efforts of Judge Lasker and the plaintiffs, that support was undercut by resistance to judicial involvement within City Hall and by apparent administrative incompetence. The Beame administration preferred to settle every corrections dispute with the plaintiffs on an adversary basis in federal court rather than through negotiations. The administration did, however, make some attempts to

improve conditions in the city jails. It also offered to reopen the Tombs by the summer of 1976 to ease overcrowding, and suggested that nine new state superior courts be established to speed up the processing of cases.

Yet these limited initiatives proved ineffective. Criminologist Robert Fishman stated in one study that the city's multi-million dollar criminal rehabilitation and prison alternative program were failures. Warning that these efforts might aggravate rather than reduce the crime problem, Fishman's report suggested discontinuing these rehabilitation programs urging instead, "preventive detention" and speedier trials as a more practically effective means to deter crime.

But after all these years, the Tombs case had a direct impact on New York City politics. In the November 1976 election the voters approved a city charter revision strengthening the oversight powers of the New York City Board of Correction. Board chairman Peter Tufo announced that the newly strengthened board would hold public hearings on the crisis facing the city jails.

In 1977 Tufo's board began to clamor for improvements in the jails, proposing a "Bill of Rights" that would effect great change in almost every facet of prison life. Such a bill would set minimum standards for jail conditions, eliminate congested housing and protect inmates' rights concerning personal matters such as choice of hairstyles. In 1978, the Board of Correction set 16 minimum standards, governing all of New York's correctional facilities that were binding on the city as a result of the new grant of authority to the board by the voters in the November election.[9] Increasingly, the board itself began to monitor conditions in the jails.

City Hall insistently refused to accept full responsibility for decrepit jail conditions. Corrections officials noted that the prison congestion was being aggravated by the state's inability properly to house several hundred already-sentenced. felons. They added that in order to comply with Judge Lasker's mandate prohibiting more than one inmate per cell, the city might be forced to release some detainees still awaiting trial.

Nor had the city's efforts produced in negligible improvement in Riker's Island prison conditions. Once again prisoners described the dehumanizing prison conditions at Riker's and specifically cited the noise, cramped quarters, rats and fear of assault by fellow inmates that had sparked a 1975 riot. Correction officials voiced their concern that a new rebellion might break out at any time. In addition, corrections costs were becoming a worry. The National Council on Crime and Delinquency reported that it cost the city of New York $26,000 annually to keep a single prisoner in the city jails.

In the years after his 1975 decision extending federal court jurisdiction to Riker's Island, Judge Lasker took a less visible role in the jail controversy. Preferring to allow the city the discretion to comply with his decrees, the judge tried to avoid public disputes with the corrections department and Mayor Beame, although he did monitor what was occurring at Riker's Island.[10] Lasker relied on the attorneys from the Legal Aid Society and on letters from inmates to monitor conditions in the city jails.
Although the judge did preside over the settlement of several jail problems through negotiations between Legal Aid and the city, some observers thought that he was too tolerant of compliance delays by the corrections department.

The legal aid groups in the city had orchestrated their assault on the city's corrections system. The original Tombs suit, Rhem v. Malcolm, was only the first of seven class action suits challenging the constitutionality of the conditions of confinement in New York City's major corrections facilities.[11] Full trials were held in three of the cases, including Rhem, and follow-up litigation consumed additional court time. When newly elected Mayor Edward Koch took office in 1978, he expressed his willingness to negotiate, rather than litigate, a settlement with the plaintiffs regarding the conditions of confinement in the New York City jails. As mayor-elect, Koch had shown an interest in jail reform during his years in Congress, and these expectations were heightened when he dined on Christmas Day, 1977 with Riker's Island inmates, pledging to reduce jail overcrowding and to improve the morale of corrections staff. When he took office, the parties to the suit agreed to suspend all pending jail litigation while trying to negotiate their outstanding differences.

After almost a year of negotiations, a broad settlement was reached in November. Consent decrees were entered in the three cases over which Judge Lasker presided and in the four jail cases pending before other federal courts in the city.[12] In the interest of uniformity and econmomy, the consent decrees before the other courts were transferred to Judge Lasker for enforcement purposes.

The resulting consent judgments bound the city to make improvements in many areas of corrections policy. The decree's provisions included: maintaining a safe jail environment; providing nutritious and properly prepared food; treating detainees' personal property with respect during cell

searches; classifying detainees and allowing some detainees unescorted movement; providing two hours of meaningful law library access each day; ceasing routine body cavity inspections without cause; providing basic personal hygiene items; supplying clean linens and bedding; instituting a laundry service for detainees' personal clothing; limiting daytime lock-in to two hours; following certain due process procedures when property was siezed or when an inmate is classified as a security risk; installing radio outlets in inmates' cells to limit noise; providing detainees in punitive segregation with daily showers, medical care and law library access; and distributing notices to new inmates explaining the Consent Judgments. In a separate consent order in Benjamin v. Malcolm,[13] the defendants agreed to provide one telephone for every 30 inmates at the House of Detention for Men, and to install privacy shields.

The state and federal government undertook to finance some of the needed changes within New York's correctional system. The state and city negotiated an agreement early in the spring of 1978 by which the state would buy or lease the entire Riker's Island complex from New York City, which would then use the money to reopen Tombs and to upgrade or build other jail facilities. The plan called for a gradual takeover of Riker's Island by New York State. Mayor Koch publicly announced a $1.5 million federally funded program targeted at providing newly released prisoners with community development work throughout the city.

The city also made administrative changes. A new corrections commissioner, Peter Ciuros, undertook one of the largest administrative shakeups in Corrections Department history by demoting, promoting or

reassigning more than three dozen of the highest ranking corrections officials. Early in 1979, Ciuros attacked the incompetency of his own agency, citing "multiple failures" by several corrections staff members.

The city and state took other measures to relieve the beleagured jail system. Governor Hugh Carey and Mayor Koch announced that the plan to lease Riker's to the state would be supplemented by the completion of eight new community-based detention centers around the city. The state agreed to house 1000 prisoners sentenced by the city and to assume responsibility for state prisoners now housed in city facilities. The Koch administration also planned to renovate the Manhattan House of Detention and make improvements in other jails.

Despite these efforts, the trouble in the jails did not end. More than 600 Riker's corrections officers staged a one day wildcat strike. Though Union president Philip Seelig and Commissioner Ciuros agreed that corrections officers had onerous working conditions and that the state of the city's correctional system was deplorable, they disagreed about what was to be done about it.

Turmoil in the city jails, especially Riker's Island, continued into 1980. Early in that year, Riker's inmates refused to leave the institution for scheduled court appearances because they claimed that court-appointed lawyers would not visit them in jail. In February four inmates escaped from their cells on Riker's Island. Overcrowding at Riker's, which was still under city control, and other city jails remained a serious problem. The situation was exacerbated by the Koch administration's policy of leaving several hundred corrections jobs unfilled in order to narrow the city's budget deficit. The

city said it had to make up for the reduction in the work force by increasing the amount of overtime served by those remaining on the job, yet the cost to the city for correctional guard overtime was $1.5 million.

Mayor Koch fired Commissioner Ciuros in March 1980 because of Ciuros' opposition to the leasing of the Riker's complex, replacing him with Benjamin Ward, who had been the chief of the Housing Authority police. Meanwhile, the state's attempts to take over the Riker's facility were delayed by the city's demand that the state pay for the property more quickly as well as reimburse the city for police and fire services that it provided. Mayor Koch also took other steps to implement changes in city corrections policy, including the announcing of a comprehensive $99.8 million plan for the city's correctional system on October 16, 1980. Koch also urged that the city cooperate more fully with the state prison system.

New York City's budget crisis raised the possibility that the money to make needed improvements in the jails would not be available. In January 1980, it was rumored that the Koch administration was debating whether to cut $20 million from the city's $783 million budget during the next two years. But shortly thereafter Mayor Koch assured Commissioner Benjamin Ward that the city would provide the department with the funds needed to comply with the consent judgment.[14] In a subsequent letter to Mayor Koch the Department of Corrections stated that conditions in the city jails had "deteriorated.[15]

But like other attempts at reform, these proved only moderately effective in practice. The Correctional Association of New York accused the city of wasting hundreds of thousands of dollars annually by unnecessarily jailing thousands of people who were incapable of assuming the required bail costs,

criticism of jail conditions persisted. By the end of 1980 the city was once again in court defending its operation of the jails.

The crisis concerning New York City jails entered a new phase in 1981, when lawyers representing the plainitffs filed a motion before Judge Lasker that the city be held in contempt of court. They declared that despite the city's apparent willingness to improve jail conditions, as evidenced by its signature on the 1978 consent decrees, it had in practice "perpetuated oppressive and punitive conditions which contrast starkly with the consent judgment's requirements."[16] The plaintiffs alleged that conditions in the city jails that year fell far short of the standards set in the consent decree. The motion described the violations as "not simply isolated instances of noncompliance but violations that have been systemic, pervasive, and at this point, longstanding.[17] In addition to the contempt judgments against the city officials, the plaintiffs sought imposition of a fine against Commissioner Ward and the appointment of a Special Master who would oversee compliance, investigate instances of noncompliance, assist the defendants in achieving compliance.

In their contempt motion, the plaintiffs alleged that the jails contained dangerous electrical defects, substandard sanitary conditions and poor plumbing, deficient food services, violations of consent judgments in cell search provisions, and violations of regulation governing body cavity searches and violence against inmates. They complained that implementation of the inmate classification and placement procedures was incomplete, that inmates were allowed inadequate time at the law libraries of most jails, that inadequate laundry and linen services existed along with inadequate bedding

for inmates and that many personal items such as toothbrushes, toothpaste, cups and combs were not provided inmates, The motions also addressed several other problem areas said to exist in jails: punitive segregation of inmates at some jails, lack of due process procedures for high security inmates, insufficient lock-in/lock-out time, excessive noise, poor telephone service, and the persistent failure of the city to provide all newly admitted detainees with a list of topics covered by the 1978 consent judgments.

While Judge Lasker denied the motion, the fact that it was made at all suggested that the plaintiffs believed that the federal court's remedial decrees were being ignored. A month later, Judge Lasker gave New York City just 30 days to reduce its jail population. In July Lasker ordered the state to accept 530 convicted felons held in the New York City jails and required the state to accept prisoners newly sentenced to state prison within 48 hours after transfer papers were completed. Grumbling state officials accepted the prisoners, joking that Morris Lasker himself would soon be a defendant in the overcrowding suits that now would be filed due to the transfers. New York City, meanwhile, agreed to construct prefabricated dormitories for 200 more inmates in New York City, thereby expanding the capacity of the city institutions to approximately 9200

Overcrowding at Riker's Island again became the focus of jail hearings in Judge Lasker's court in 1983. The city requested that 1872 inmates be permitted at Riker's, well over the 1200 limit Lasker had established in 1980. Correctional officers, inmates and the Board of Corrections agreed that the overcrowding had contributed to the deterioration of conditions at the

jail, but the Department of Corrections said that even with an earlier increase to 1445, conditions still were adequate at Riker's.

Judge Lasker denied the city's request. Citing two major failings in the jail system--that about 60 percent of all inmates spent less than a week in jail, since many charges are dropped for lack of evidence or other reasons, and that the average inmate stay had increased from 28 days in 1977 to 42 days only a few years later,due in large part to court backlogs--Lasker proposed that offenders be allowed to put up 10 per cent cash as security for low bails. Alternatively, he suggested increased reliance on non-jail sentences. Lasker also urged speeding up courtroom procedures, to cut the time that inmates wait for trial.

The city finally opened the new Tombs facility in October 1983. The new jail contained 421 cells that one magazine called "luxurious", complete with butcher block counters, special shaving lights, and doors painted red and lavender. Of the 421 inmmates in the jail, three-fourths would be pretrial detainees who would most likely make bail. The cost of the renovation was $42 million.

But the opening of the new jail did not offset the problems caused by acute overcrowding. Despite the transfer of 150 state prisoners to a state prison on Long Island, Judge Lasker decided that the number of antiquated cells at Riker's Island would have to be cut by 245. Under terms of a court order signed by Judge Lasker in late October, the city was forced to free inmates excess of the 10,300 who could be legally housed in the city jails. Those who were awaiting trial and those with the lowest bail would be the first let out, according to the judge, and 610 eventually were released. When

this criterion for release did not prevent the freeing of three murderers and two sex offenders (one former inmate was rearrested within two days on a rape charge), Lasker changed the release standards to exclude inmates charged with homicide or sex offenses, and those who already had taken advantage of the program once. Mayor Koch blamed the overcrowding on judges who failed to speed up their sentencing of inmates; Judge Lasker, in turn, blamed politicians who were charged with solving jail problems but who were fearful of damaging their re-election chances and preferred to foist the issue on the courts.[19] In any case, the release order made the jobs of corrections officials considerably more difficult. One spokesman for the department said that the corrections staff was examining the prison population every four hours in order to comply with the judge's decree.

Manhattan District attorney Robert Morgenthau announced in December 1983 that four of every ten inmates released in November to ease overcrowding--about twice the normal rate--either missed court appearances or were subsequently rearrested on new charges. Mayor Koch, prompted by the prisoner release, announced in December that the city would spend $154 million to build jail space for 2200 prisoners .

Conclusion

In 1982 much still remained to be done. The new Tombs did little to alleviate the other still inadequate conditions at Riker's Island. Judge Lasker still hoped to work with the Koch administration to improve the jail, and allowed City Hall discretion in complying with his decrees. The judge

said that he was encouraged by Mayor Koch's generally cooperative attitude on jail issues.[20] Still, Lasker said that the New York City jail suit would be one of the cases over which he would continue to preside when he retired to senior status in 1983, since it was unlikely that compliance by the city would be achieved by that time.

Final court withdrawal, Lasker said, was contingent on continued cooperation by City Hall with the court, and the appropriation by the city of enough money to pay for most of the reforms.[21] Some of the attorneys involved in the suit, held a more skeptical view of the possibility of court disengagement. If the court withdrew, one of the plaintiff attorneys later stated, "people would slip back because there wouldn't be a case...If the court withdrew no one would force the Department of Corrections to do anything."[22]

More than a decade after the first jail suit was brought in New York, the administration of city jails by the Corrections Department could be described just as it had been by one observer in the early 1970s, as marked by "the absence of comprehensive and rational long-term planning" by the city and as a "series of reactions--to overcrowding and riots in jails, and to prisoners' lawsuits in the courts."[23]

Most observers agree, nonetheless, that much progress has taken place. "There has been a revolution in our system," said a spokesman for the Department of Corrections. "I'm not saying it is a beautiful place to stay, but it's night and day. The guarantees, privileges and rights of inmates are so much better today than in 1975."[24]

Part 2: The Impact

The blueprint for reform of the New York City jails was contained in two sets of standards--those established by the consent decree of the federal court and those set by the Board of Correction. The consent decrees were promulgated to remedy the city's violation of the inmmates' federal constitutional guarantees. All such decrees were transferred for enforcement purposes to Judge Lasker's court in 1979. The set of minimum standards of the New York City Board of Correction were adopted by the Board on February 14, 1977 pursuant to the change in the city charter approved by the voters the previous November. They obligated the corrections department to observe 16 guidelines when operating its jails. Both sets of regulations contained both substantive and procedural elements.

The substantive elements of the consent decrees concerned institutional conditions, such as improvement of jail cleanliness and the provision of nutritious food, the installation of radio outlets in cells; the expansion of inmate programs; the granting of privileges to

inmates detained in punitive segregation; and the provision of telephones and privacy shields in some of the jails.

The procedural elements of the reform decrees concerned administrative practices of the corrections department, including respectful treatment of prisoners and proper classification of detainees. The substantive elements of the Board of Correction standards pertained to areas such as personal hygiene, overcrowding, recreation, religion, access to courts, visiting privileges, telephone privileges, correspondence, access to packages, access to publications, and access to the media. The procedural elements pertained to nondiscriminatory treatment of inmatess classification of inmatess correctional officer overtimes, inmate lock-in practicess and variance procedures for changes in minimum standards.

The litigation and the reform guidelines that it advanced have had major impact in both substantive and procedural area of corrections and in corrections policymaking itself. They have forced the New York City Department of Corrections to undergo changes in personnel, structure and organizational tasks and have helped transform the Board of Correction from a largely impotent monitor of city corrections matters into a vigorous proponent of better jails.

The litigation has also produced significant improvements in many aspects of jail conditions, and many of the formerly dilapidated conditions of inmate confinement have disappeared. Detainees enjoy more due process protections, as well as access to law libraries, better recreational opportunities and cleaner cells. By 1981, the city had met

the minimum standards set by the Board of Correction with respect to religious observance, prompt receipt of correspondence, telephone access, subscription to publications and access to the media.

A nonpartisan Citizen's Budget Commission published a generally favorable report in April 1984 on the condition of New York City's jails.[25] The commission found that the volume of services expanded greatly because of the large increase in the jail population: between 1978 and 1983 the average inmate population in the city grew by 44.4 percent. Most of this increase taking place in the population of pretrial detainees.

Changes in the quality of jail services were harder to measure, but the commission reported a general increase in service levels since 1978. Despite a doubling in the number of escapes between 1980 and 1982, the overall number of inmate escapes declined after 1978 and escapes in 1983 were the lowest in six years. In other ways, conditions in the New York City jails also are better than before the lawsuits. Inmates were allowed more visitors in 1983 than in 1978. More inmates were punctually transported to their court apppointments in 1982 than four years previously.

But the changes are by no means uniformly positive. The number of assaults by inmates on other inmates or correctional officers was more than 180 per cent higher in 1982 than in 1978, although some of the increase was attributable to better reporting of such incidents. (No data were available from 1983). This increase in inmate violence occurred at a rate greater than that of the increase in the New York

City jail population. This lends credence to the assertion of some correctional officers that the jails are now less safe than they were before court intervention on behalf of inmate rights.

The data are mixed on two additional measures of correctional service quality, average cost per inmate and the ratio of inmates to uniformed employees of the corrections department. The cost per inmate improved between 1978 and 1983, but it rose 8.6 percent in 1982-83. The average daily population in the city jails per uniformed employee also worsened. It increased 16.3 percent 1978 and 1983 and 10 percent alone in FY 1982-83. Jail overcrowding in New York City has contributed to these cost and staffing problems. In 1983, for example, average daily inmate population was 9,948.

Even the system of delivering inmates to court has encountered problems. Some defendants brought to court as early as 7 AM for the 9:30 start of the days legal proceedings have to wait until midafternoon before their cases are called. One Brooklyn state supreme court justice stated that he was forced to dismiss four rape charges against one suspect because of excessive delays by corrections authorities in handling the case.

The reform standards themselves, both those promulgated by the Board of Correction and those set by the court, have not been fully met. In 1981 there remained, in the opinion of the plaintiffs, "significant, ongoing violations", at least 65 in number, which were "system-wide'[26] in scope. The plaintiffs believed that these violations predated the more recent problems such as overcrowding, which clogged the jails after

the signing of the consent decrees in 1979. They claimed that the the city had not complied with the remedial orders pertaining to environmental health, nutrition, classification and movement, cell searches and body cavity searches. [27]

Prison officials argue that they are doing the best they can to make improvements in New York's jails, and that circumstances beyond their control and that of the court have prevented fuller compliance. In one instance, the provisions of the reform decree have been overtaken by events. The city defendants disregarded provisions of the consent decree governing the permissability of body cavity searches after the United States Supreme Court upheld such procedures in Bell v. Wolfish [28] in 1979.

There have been problems in incorporating corrections standards into the organizational routines of the Department of Corrections, for middle and lower level corrections officials have been more reluctant to achieve the corrections standards than have the executives. It has been difficult for correctional officers to observe the reform standards concerning cell searches, confiscation of inmate property, and the provision of linen service and body cavity searches, because many correctional officers and other officials in the department believe that such requirements conflict with their responsibilities to keep order in the jails.[29]. In order to keep order, the guards disregard such rules when necessary, and their superiors usually ignore the violations.

Many obstacles to compliance are not the fault of the defendants and are beyond the control of the court. Longstanding physical

deterioration of the jails presents a significant impediment to compliance with the reform standards. Rodent and insect infestation is common. Many facilities in which detainees are confined possess inoperative toilets, sinks and lights, as well as exposed electrical wires. In the corrections department master plan for the coming decade, Jails for the 80's, these problems are blamed on "high levels of deferred maintenance". The department possessed only enough resources to attack the most grievous physical problems.

Jail overcrowding contributes to the inability of the city defendants to comply with the reform standards. City jails built to house 8300 inmates contained more than 9000 in 1981, and this overcrowding was not due to inmate transfers ordered by Judge Lasker after the closing of the Manhattan House of Detention. New laws requiring stricter sentencing for certain crimes have raised the arrest rate, as has public pressure on the courts to impose longer sentences. But for advocates of court reform, the result is frustrating. New inmates are often housed for days without beds or mattresses. There are shortages of food and clothing, and jail programs often are disrupted. The ability of inmates to do legal research is impaired, as they compete with one another for possession of legal research materials. Long lines for telephones are commonplace in the city houses of detention, and the food services in the jails often break down under the pressure of serving more than 9000 daily mails. In addition, with inmates jammed into close confinement with one another, there are frequent fights in

the facilities. While the litigation has effected significant improvement in the jails, clearly much remains to be done.

The attitude of the mayor and city corrections officials toward reform is praised widely and has contributed to the progress being made. Board of Correction Chairman Peter Tufo described the city's willingness to meet the minimum standards as "impressive"[30]. Judge Morris Lasker called the attitude of the Koch administration toward reform as "conciliatory"[31] By 1982, the deliberate resistance of the city to court reform, characteristic of the Beame administration, had long since changed.

Impact: Bureaucratic and Administrative

The jail litigation in New York City has changed how the city's Department of Correction does business. More time is spent by corrections officials on the issues raised in the lawsuits and in preparing for the legal maneuvers that accompany the litigation. The discretion historically possessed by corrections officials has been reduced, even as the corrections department has grown.

Corrections officials now spend more time working on legal matters than ever before. The reform standards have established rules governing the behavior of correctional officials at all levels. Inmate complaints are brought by the plaintiff attorneys to the courts and corrections officials frequently are pressured by the court to do something to remedy the complaints. Corrections department officials spend hundreds

of hours testifying in Judge Lasker's courtroom, negotiating with the staff of the Board of Correction and engaging in other legal activities.

The litigation also has led to significant personnel changes at the highest levels of the Department of Corrections. As the post has become politicized, several individuals have served as corrections director in the past decade, and the Commissioner is now more directly accountable for his official actions. A new office, the Deputy Commissioner of Corrections for Program Services and Legal Policy, has been established to grapple with many of the issues raised by the litigation. The Board of Correction has been transformed into a vigorous watchdog of the corrections department, and its minimum standards have supplemented the provisions of the federal consent decree.

Since 1978 the Corrections Department has reduced the time it takes to deliver approximately 1000 inmates to court each day. The amount of sick leave taken by correctional officers each year has been cut, and the city has organized a management auditing and planning unit to review departmental policies and procedures. The Department of Correction plans to improve the training of its staff and to improve its computer resources. Despite the loss of an anticipated $40 million in state money for its building program, money that was lost when the voters rejected a bond issue in November 1980, the Department of Correction still plans to spend $179 million to expand its system capacity to 9800, to enlarge to 60 square feet the amount of dormitory space allotted to each detainee, and to complete renovation of the Manhattan House of Detention. Other improvements in the corrections system will be made.

The litigation also has reduced the discretion that historically characterized the tasks of corrections officials in New York City. Virtually every area of prison administration now has a minimum standard to govern it, set either by the court or the Board of Correction. "People now have to justify what they do." said one attorney, implying that a reduction in discretion necessarily leads to greater accountability.[32]

Former Commissioner Benjamin Ward and other members of the Corrections Department believe many of the standards are unrealistic. Rules governing guard behavior, for example, that specify that prison guards counts 2200 detainees three times within two hours are impossible to actually carry out. Nor can a guard "pedigree" an inmate--match him visually and through questions with the information contained on his identification card--before he goes to recreation, as mandated by the reform standards, because to do so would take so much time that the detainees would not receive their required recreation. "If we were to follow the rules and regulations", said Phillip Seelig, president of the correctional officers union, "We couldn't function. Everything would grind to a halt."[33]

The officers cope by disregarding some of the the rules of the reform decrees. Inmate counts sometimes are faked and guards take fewer counts than are required. Sometimes they fail to pedigree inmates before recreation time. Wardens tolerate these violations, according to Seelig, as long as no one escapes.[34] Many correctional officers are critical of the reform standards for this failure to take into account

both the realities of prison culture and the critical tasks that an unarmed prison guard must perform.[35] One solution to the problem, Ward argues, would be for courts to refuse to get extensively involved in the details of administration. Ward believes that the inability of judges and plaintiff attorneys to distinguish between constitutional minima and optimum levels of service delivery is a major shortcoming of institutional reform litigation. "No one lives in optimum conditions," he stated, "There is a point (in reform litigation) at which society cannot afford any more changes. You ought to run decent and humane jails, but you don't have to give away the shop. In the New York City jail suits, Ward believed, Judge Lasker went farther than the constitution required.[36]

The behavior of correctional officers, the street level bureaucrats whose behavior was described by one Board of Correction member as "paramilitary,"[37] poses a major obstacle to bringing city jail conditions up to the reform standards. Faced with two major responsibilities, maintaining order in the jails and and protecting themselves from inmate violence, many believe that the courts have undermined their ability to do either. Some guards complain that jail inmates are treated better than the correctional officers. "You have to understand something about this job," said Phillip Seelig, referring to the low status enjoyed by prison guards. "I am a nobody."[38] The morale of many correctional officers has been futher weakened by their perception that their salary, retirement benefits, and job status fall below those of other uniformed city employees such as policemen and firemen.

The consent decree in New York, like similar jail reform decrees in other jurisdictions, has ignored the role of the correctional officer. The courts have included minimum standards for conditions in the jail without attending to the lot of the guard who carries them out, focusing, instead on higher-ups in the correctional bureaucracy. The fault also lies with the training the guards receive. Members of the Board of Correction have faulted the corrections department for not instructing the guards in the minimum standards as a regular part of the job. The standards are treated as "special things" that intrude on the correctional officers' job. This problem is especially prevalent among the officers, who served during the years before the reform decrees were ordered into effect by the court.

The court's neglect of the role of the prison guard in implementing jail reform finds its parallel in the neglect by the courts of the lowest levels of the education bureaucracy in the special education case studies: classroom teachers. In both domains, the courts have focused on obvious, verifiable measures of compliance--on whether new bureaus have been established, or the size of populations served--and in both issue areas compliance at the lowest levels has been problematic, if indeed, those areas are addressed at all. In the PARC litigation and the Jose P., there there is no judicial attempt to investigate what goes on in special education classrooms. In New York City jail cases the court has spent little time inquiring into the strenuous demands placed on prison guards, preferring instead to view the officers as obstacles to implementation. Until decrees reflect a more sophisticated

understanding of the workings of the public bureaucracies they seek to change, it is likely that problems shaping the behavior of lower level operators will continue.

Impact: Political

The jail litigation in New York City put corrections matters squarely on the public menu for the political leaders of New York City.[39] Conditions in the jails, and corrections policy more generally, became subjects of frequent attention and debate by the mayor and the New York City Council. Even the voters had an opportunity to consider corrections policy: in the fall of 1976, the electorate approved a charter revision that empowered the Board of Corrections to set the minimum standards that were to govern the city's penal institutions. This growing political importance of corrections issues has been fueled by the press, which closely covered the jail controversy. Another sign of the increased importance of corrections on the political agenda took place came in February 1980, when the Koch administration was considering making budget cuts in several city departments. At that time the mayor discussed the budgetary needs of the corrections department with Commissioner Ward and assured him that city hall would provide corrections with the money needed to meet the requirements of the consent decree regardless of cuts in the other departments.

The significant budget increases received by the Corrections Department are another indicator of the importance of corrections issues. More money was spent on the city jails in 1980-81 than ever before, and this total was expected to rise even more in subsequent years. This growth occurred despite citywide cutbacks in other municipal services. In 1973-74 the corrections department budget was 8.6 per cent of the entire budget of New York City. In 1980-81, the proportion had risen to more than 11 per cent. Between 1975-76 and 1980-81 annual labor costs in the city increased 95 per cent, from $75.5 million to $147 million. Administrative costs in that period increased 134 per cent, from $14.8 million to $84.6 million. Much of this increase was due to security problems that accompanied the provision of the new programs and to broadening the range of privileges enjoyed by detainees. By contrast, during the same period the New York City police department reduced its non-labor related costs by 83 per cent (from $59 to $49 million). The increase in the corrections appropriation took place despite a city labor force reduction of 23.6 per cent.

A portion of this increase in the corrections budget is undoubtedly attributable to the topheavy correction bureaucracy. Eight per cent of the corrections budget, more than twice that of the police department, is devoted to administration. Yet corrections officials defend the high administrative cost as the result of the operation by the department of high security facilities where the inmates eat and sleep. In police jails not under the control of the corrections department, by contrast, such costs are not incurred. Comptroller Harrison Goldin's audit staff

also found that contractors for the corrections department systematically overcharged the city for jail maintenance work.

Yet in some ways, the Corrections Department still remains a "stepchild" of New York City politics. Although no longer neglected by City Hall, the department's political influence is weakened because many people think that it is pressure from the federal court, not the corrections department, to which the city really responds. When the federal court withdraws from the suit and ends its supervision of the corrections department, it is unclear whether city hall will remain committed to jail issues. Commissioner Ward, for one, believes that the system will lapse into its historic state of neglect once that happens.[40]

Impact: Policymaking

The lawsuits challenging conditions in the New York City jails have altered the process of policymaking on corrections issues by , making it more legalistic. Procedural guarantees govern many areas of jail administration, from the inspection of inmate clothing and correspondence to body cavity searches. Property taken from inmates now must be recorded and its owner identified. Inmates have been afforded access to legal counsel, and the opportunity to participate in inmate councils. Procedural guarantees have been extended to detainees in high security confinement.

The subjects of dispute between the city and the plaintiffs has evolved over the past dozen years, from a concern with gross adequacy

issues to a preoccupation with the details of penal administration. Ten years ago the plaintiff lawyers brought the attention of the courts to the gross inadequacies in the penal system such as unsanitary conditions. As the decade passed, however, and the more flagrant problems were improved, the focus of the suits changed to such complicated questions as the permissble square footage to be allowed for detainees or the type of windows to be placed in the jails.

The litigation also has altered the politics of policymaking on corrections policy in New York City. The role of attorneys in both sides has been much enhanced. The Legal Aid Society bargained with the city defendants about the content of the consent decree and it continues to monitor the conditions in the New York City jails more than ten years after filing of the first suit. Not surprisingly, after a decade many of the principles in the suit know each other well and engage in an informal but important form of bargaining that Commissioner Ward described as "pillow case communication."[41]

The litigation has affected the process of policymaking in corrections in other ways. Many of the administrators have learned to use the court to pursue their own purposes and preferences and the jail system is itself more open, as inmate phone calls and letters to the plaintiff litigant groups alert plaintiff attorneys to violations of the reform standards.

Finally, the litigation has made the role of the professional jail expert an important one--a very different outcome than in the special education case studies, where legal reform eroded the influence of

special educators in Pennsylvania and the New York City's Board of Education. A certified nutritionist was retained by the plaintiffs to evaluate jail food service. A public health sanitarian was hired by the plaintiffs to evaluate the compliance by the city with the sanitation orders of the federal court. A team of consultants was hired in 1981 to study how the new Manhattan House of Detention could better serve the needs of both the city and the corrections department.

The influential role of the plaintiff's attorneys who informally monitor the implementation of the reform standards has been highly controversial. Many corrections officials resent those attorneys who question their willingness to work for reform. Corrections personnel fault lawyers for their focus on individual problems, rather than the progress of the entire institution. Former Commissioner Benjamin Ward has said that the plaintiffs attorneys tend to focus on the "picayune. They fail to see the forest for the trees...They wonder whether inmates are allowed to wear jewelry or whether the laundry is folded."[42] Ward described the continuing court oversight as a "nuisance", and promised that he would resist committing the corrections department to the inflexible terms of a consent decree.

The reform litigation in New York City seems to focus on so much administrative detail, according to Ward, because the attorneys in New

York City and other jails suits around the country have a vested interest in perpetuating their considerable influence in corrections policy.[43] Many people also have suggested that the lengthy involvement of legal activists in jail reform cases disguises their belief that prisons and jails should be closed down entirely.[44] Whatever the truth of these accusations, the process of corrections policymaking is considerably different in 1983 than in 1970. Yet an important question remains unanswered. After the initial shock of court intervention alleviated the most extreme jail abuses, will the new corrections politics prove preferable to the old?

VII. The *Palmigiano* Decision: Reforming the Rhode Island Adult Correctional Institutions

Part I. The Litigation

Rhode Island has a single central prison, the Adult Correctional Institution of Rhode Island (ACI), located in Cranston, a small town just outside Providence. Because of Rhode Island's small size and the easy accessibility of the ACI to all parts of the state, the institution serves as a pre-trial detention center and also as a post-conviction adult penitentiary. The federal government also contracts with Rhode Island officials to keep federal prisoners, including those awaiting trial, in the ACI. Thus, the ACI operates as several institutions in one: a pre-trial facility similar to what is usually known as a jail, a state prison housing those convicted by the state of serious crimes, and a federal penitentiary.

In 1969 the ACI was beset with internal problems. In August of that year, 25 correctional officers called in sick to protest favoritism toward inmates demonstrated the scheduling by the scheduling by administrators of a "family day" for 50 inmates. Later in 1969 inmates staged a work stoppage to protest conditions in the Behavioral Control Unit, a branch of the ACI which housed particularly dangerous inmates segregated from the rest of the prison population. The inmates said they were protesting the inadequacy of prison food, the paucity of recreational programs, and restrictions on visiting hours. They punctuated their complaints by throwing food and feces onto the floor in front of their cells.

Resort to the Courts

In early October 1969 one ACI inmate, Joseph S. Morris, turned his presence as a witness in a criminal proceeding into an opportunity to complain to Federal Judge Raymond Pettine about the conditions in the facility: Judge Pettine requested the public defender's office in Providence to investigate Morris' complaint, and a lawyer sent by that office confirmed Morris' allegations.

Judge Pettine, who approved of disliked the tendency of other federal judges to intervene in prison administration, informally contacted corrections officials to see if they would voluntarily clean up the prison. Long accustomed to running the facility without interference, they were astonished that their administration of the prison had been challenged by a federal judge. After Rhode Island Legal Services, also alarmed by conditions in the prison, procured a doctor willing to testify before Judge Pettine that the conditions were hazardous, prison administrators agreed improve the facility. For their part, ACI inmates agreed to clean up the mess they had made.

External attention continued to focus on the ACI despite this temporary easing of the crisis. On October 21, 1969 Pettine adopted a proposal approved by the interested parties which addressed some of the inmates' concerns. Legal Services attorneys agreed to continue to monitor the situation at ACI. When, a month later, they had concluded that the constitutional rights of ACI inmates were being violated by prison conditions, the lawyers decided to return to court.

Legal Services filed a class action suit on December 16, 1979 on behalf of all ACI inmates and a sub-class of prisoners in the Behavioral Control Unit. The suit challenged the constitutionality of the classification and

disciplinary procedures at the ACI as well as other aspects of prison life. Through the following months, plaintiffs and corrections officials from the Rhode Island Department of Social Welfare (which administered the ACI) negotiated their differences, and in January the parties submitted to the court a draft of their settlement.[1] This draft established new procedures for classification of ACI inmates, including provisions for a classification board based on record keeping and review by the warden.

When six ACI inmates, including Joseph Morris, objected to the settlement, Judge Pettine ordered that copies of the agreement be posted in the ACI. He examined the written responses of the prisoners and consulted with penologists about the sufficiency of the settlement. On March 11, 1970 Judge Pettine announced his decision to adopt the negotiated Morris rules, despite the inmates' objections.[2] The rules committed the court to reviewing all classification hearings in ACI, and to retaining all jurisdiction in the case for 18 months, thus enabling the parties to develop a mechanism for enforcing the rules. In 1972 the Morris rules were adaopted as a final decree.

That did not end matters, for problems kept surfacing. On August 24, 1970, while presiding over a three-judge court in a suit initiated by inmate Nicholas Palmigiano, Judge Pettine ruled that censorship of the mail of pre-trial detainees by prison officials at ACI was unconstitutional.[3] He also barred Rhode Island corrections officials from reading any prisoner mail. The "parade of horribles"--inmate violence, filthy conditions, and guard mistreatment of inmates continued. Guards unhappy with the inmate activism

struck the institution in October 1971, demanding that strong disciplinary measures be taken against the inmates.

Though the strike was short-lived, guard dissatisfaction continued. Three months later, ACI warden Francis A. Howard gave correctional officers in the maximum security unit the greater authority they demanded after the guards had refused to report for work. But violence remained a likely possibility. On November 18, 1971 material for making a bomb was found in the prison. Late one evening that same week eleven ACI inmates suspected of plotting to disrupt the prison were summarily transferred to other institutions without advance notice or opportunity to contact their families or lawyers. Also in November, ACI inmates held a prison guard unconscious forcing state corrections officials to discuss their demands concerning issues such as sanitation, more exercise time, supervised feeding of inmates outside their cells, better laundry service, and an amnesty for those inmates holding the guards.

One hundred correctional officers held a "sick out" in October 1972, protesting the contract offered them by the state of Rhode Island. In March 1973 correctional officers again refused to report to work at the ACI, this time to protest the handling of a fight between an inmate and a correctional officer. Rhode Island Governor Phillip Noel sent National Guard troops into the prison to take the place of the correctional officers. They were withdrawn after the guards returned to work and promised to refrain from future job actions.

In January 1973, 55 ACI inmates refused to return to their cells in order to demand more recreation time. The prisoners were mollified when adjustments in their schedules were permitted. Three ACI prisoners escaped

from the institution on February 6, 1973 and one was arrested two weeks later on an armed robbery charge. A riot shortly thereafter in the maximum security section of the ACI caused $250,000 in damages. A month later an inmate was stabbed to death. In June a prison guard was murdered and state Corrections Director Travisano suspended the Morris rules, an action of dubious legality. The new ACI warden, James Mullen, called the rules "a hassle all the way."

The ACI troubles prompted still one more change in Rhode Island corrections. In March of 1974, Travisano resigned as head of the Rhode Island prison system to accept a job as executive director of the American Correctional Association.

During these years, state corrections officials and prison reform groups constantly battled over prison matters. In 1972, the National Prisoners Rights Association, a group of ACI inmates founded by Nicholas Palmigiano, won a court order allowing the association to meet. [4] On January 16, 1973 Judge Pettine held that a prisoner may not be transferred from the ACI to a state or federal prison in another state unless afforded various procedural safeguards, written notice of the reasons for the transfer, a hearing before an impartial board, and an opportunity to present evidence on his behalf.[5] In November 1971 an Inmate Legal Assistance Program (ILAP), financed by the federal Law Enforcement Assistance Administration (LEAA), was established at the ACI to provide a variety of legal services to indigent prisoners. The ILAP possessed a permanent staff of mostly lawyers and law students, who worked at the ACI between September 1972 and June 1973. When, in July 1973 Warden Mullen evicted the ILAP from its office space in the ACI and curtailed

access of ILAP staff attorneys and law students to the prison, Rhode Island Legal Services, ILAP attorneys, and other counsel sued in federal court to secure access to the prison. Judge Pettine upheld their right of access and the inmates' right of consultation with attorneys.[6] The suspension of the Morris rules by ACI administrators was held improper in March 1974.[7]

In 1975 the already voluminous litigation entered a new phase. The American Civil Liberties Union turned its attention to conditions at the ACI when a Catholic chaplain and an advocate of inmate rights, Father Ronald Martin, was prevented by the warden from entering the prison. The ACLU challenged the act in court as a denial of Martin's First Amendment rights. At the same time, Rhode Island Legal Services gave increased attention to the possibility that the totality of ACI conditions might be challenged in court. Attorneys from the National Prison Project of Washington, D.C., also began to watch the situation in Rhode Island.

Turmoil continued unabated. There was a minor racial disturbance in April 1975 and more trouble a year later when riot-equipped policy officers were summoned to suppress a full inmate riot. In February 1976 ACI prisoners, claiming that robbery was a constant problem in the facility, asked the state legislature to reimburse them for their stolen property.

By the mid-1976 ,the ACI warden and guards had lost control of the prison. The Director of Corrections, Bradford Southworth, stated that the inmates were running the prison. The National Prisoners Rights Organization, he said, ran the prison through a reign of violence and terror.[8] Conditions at the prison were later described by Judge Pettine as a grotesque "compendium" of beatings, stabbings, fire-settings and assaults, where

"violence is simply unchecked."[9] ACI inmates sent Judge Pettine an unending stream of prisoner petitions, Ond the judge asked attorneys from Rhode Island Legal Services to represent inmates seeking to challenge the conditions at ACI. When they declined, exhausted by the task, an attorney from the National Prison Project accepted the case.

The plaintiffs--the National Prison Project, the inmates belonging to the National Prisoners Reform Association, and other attorneys--challenged the constitutionality of institutional conditions in the ACI. They charged that since their efforts to work with the state to improve the ACI under the informal auspices of Judge Pettine had not effected change, redress in the courts was the only solution. By implication, they also had concluded that the previous legal strategy of litigating individual prison issues was less than satidfactory.

The new suit, Palmigiano v. Garrahy, alleged that conditions at ACI violated both the Eighth and Fourteenth Amendments to the U.S. Constitution and state law. Conditions at the maximum and minimum buildings at ACI were said to subject inmates to excessive levels of fear and violence. Prison official assertedly subjected prisoners to intolerable conditions, including filth, unsanitary living quarters and food services, dangerously inadequate medical care, near-total idleness, and that these caused the mental and physical detericration of inmates. Plaintiffs alleged that pre-trial detainees and prisoners in protective custody were punitively subjected to conditions even worse than those endured by sentenced inmates. They sought broad injunctive relief including the permanent closing of the Maximum Security Building at ACI.

The trial lasted two weeks. Judge Pettine, hardly a stranger to this controversy, toured the ACI Correctional Institution during the hearing and sought the help of those knowledgeable in several areas of public administration: corrections, institutional, environmental, health and sanitation, and correctional psychology. The state did little to contradict plaintiff's testimony that grossly inadequate conditions existed at ACI. Because many state officials at ACI felt the situation was ripe for change, and since the state already planned to build new maximum and minimum security buildings, there were few objections voiced to the allegations of the plaintiffs.

On August 10, 1977 Judge Pettine held that conditions at the ACI constituted cruel and unusual punishment.[10] He cited deficiencies in plumbing and lavatory facilities; held that medical treatment prisoners were receiving was inadequate, found that 75 per cent of the inmates were on drugs, and that there occurred daily violence by inmates against one another. Pettine also held that the state failed to provide a classification system, as required by state law (Such a classification system rates each inmate according to his dangerousness and presecribes a corresponding degree of confinement).

Judge Pettine ordered that pre-trial detainees could be restrained only to the degree necessary to assure their appearance in court. Citing the court's duty to "require the defendants to remedy to constitutional violations which plague the ACI," the judge ordered that the maximum security facility be closed within a year. He decreed that pre-trial detainees must held separately from convicted prisoners. He ordered the defendants to

take immediate steps to correct the worst abuses at the ACI, and included with his decision a set of minimum standards with which the defendants must comply. Those standards contained provisions pertaining to heating, lighting, ventilation, insect and rodent control, inmate food, lavatory maintenance, and cell space. Pettine directed that changes be made in the prison's classification system. He originally intended to call for the creation of a citizens' committee to monitor compliance, but Governor J. Joseph Garrahy objected to such a panel, so Pettine decided to appointed a master with strong powers to perform the same task. The master would advise the state corrections department and report to the court on the progress of compliance and implementation. Allen Breed, former director of the California Youth Authority, was appointed to the position in October 1977.

Though Pettine insisted that, beyond fixing minimum standards, he would defer to state and local officials, the judge's decision was widely criticized in Rhode Island. Police in the state and the national chairman of the Fraternal Order of Police said that Pettine was "coddling felons." Former Governor Phillip Noel called Pettine an "ultra-liberal," Governor Garrahy added his view that the judge was "tilting" in favor of the prisoners. Some state legislators sought to remove Judge Pettine from the federal bench. Pettine was forced to acquire an unlisted phone number to prevent irate citizens from calling him at home.

Part 2 Implementation

Pettine's decision had little immediate effect on the volatile situation at ACI. Two weeks after his decision, ACI officials ordered a general lock-up of ACI inmates as punishment, it appeared, for their legal victory. The lock-up confined inmates to their cells for 21-22 hours per day. In November two inmates escaped from ACI, stole silver utensils from the Rhode Island Statehouse, and vowed to return them only after Governor Garrahy ordered an end to the lock-up. Work strikes by guards and food throwing incidents were common during the next few months. When, in January 1978, the court's special master, Allen Breed, described the lock-up as a barrier to implementation of Judge Pettine's orders, Pettine ordered it ended.

Breed was very active in the weeks after the decision. He spent much time in ACI interviewing inmates and staff, and exploring ACI operations. Breed also made suggestions for change in prison administration to Director Bradford Southworth, and played an important role as an adviser to Governor Garrahy.

Yet inmate troubles continued. In February, the National Prisoners Rights Association held a hunger strike. At the beginning of March 1978, two inmates organized a protest demonstration alleging that they were not receiving the visiting privileges that they had been promised. Inmates staged yet another food throwing incident. Later that year three ACI inmates urged Superior Court Judge Anthony A. Gianini to sentence them to death rather than return them to the unhospitable conditions at the ACI.

Conditions at ACI finally began to improve by mid-1978 . The replacement of Bradford Southworth as corrections director by John J. Moran, ordered by Governor Garrahy at Allan Breed's recommendation, was critical. Many had

questioned Southworth's willingness to implement Pettine's orders, and they criticized his administrative capabilities, especially his lack of control of guards and inmates. The new corrections boss, who had worked in several states, sympathized with Pettine's efforts to improve conditions at the ACI. He took the job as corrections director only on the understanding from Governor Garrahy that there would be no political interference in corrections matters.[11]

Upon assuming his new responsibilities, Moran moved swiftly. He reorganized staff and began meetings with inmates. Moran abolished the National Prisoners Rights Association and curtailed the abuse by correctional officers of overtime. By April, Judge Pettine was publicly praising Moran's administration for its willingness to comply with his decrees. Some months later, the judge acknowledged that much progress on compliance had been made, and dismissed a motion by the plaintiffs' lawyers that the state be held in contempt of court for failing to meet court standards quickly.

In the months after his decision, Judge Pettine continued to review conditions in the ACI--both through court hearings and through the special master. Whenever he would grow impatient with the pace of improvements the judge would set a deadline by which the state would have to make changes, unless it could convince him to extend it for good reason. In March, for example, Pettine, increasingly concerned about criticism that he would not enforce his mandate, set a May 1 deadline for compliance with his order on the reclassification of 529 inmates. The corrections department, now under Moran, met the judge's timetable.

In June 1978, Allen Breed resigned as master to take a position as Director of the National Institute of Corrections. His assistant, Michael Keating, was appointed special master by the court in August to replace him. Before he left, however, Breed reported to the court that the corrections department had already complied with many of the court's decrees. By the summer of 1979, two years after the original conditions and confinement decision of Judge Pettine, Michael Keating described the improvement in conditions at the ACI as "drastic," and said that the state has "traveled far down the road of compliance." Keating also praised Edward Moran's "tough, frugal, and professional style" of prison administration.[12] Outstanding issues remained--including the completion of the new maximum security facility authorized by the voters in 1972, continued improvements on the classification system, and the need to make a decision about the fate of the old maximum security building still in use--but all parties to the suit were encouraged by the progress that had been made.

Yet political opposition persisted, and hindered compliance with the Palmigiano decree. In 1979, the state house of representatives cut $885,000 for the prison system from a supplemental appropriations bill; two years earlier, in 1977, they had refused to appropriate money for prison improvements. Many state legislators said they had taken these actions because they resented the intrusion of the federal courts into the prison issues. Judge Pettine responded by threatening to fine the state $100 a day if it did not meet standards in some areas more quickly. Although the state legislature eventually and appropriated the necessary assistance, in July 1978

Rhode Island voters turned down a $5.8 million bond issue, thus seriously slowing down efforts to renovate ACI.

Over time, however, Judge Pettine also acquired significant political support in the state capital. Governor Garrahy resisted pressure to appeal Pettine's decision, in part due to an agreement with the judge that the state would be allowed more flexible compliance deadlines. Soon Garrahy publicly stated that Pettine was right to condemn conditions at ACI. Garrahy appointed an implementation team of sanitation and program experts after the court decision to help improve conditions at the ACI. In September 1978 Judge Pettine reciprocated: He supported Governor Garrahy's decision to declare a state of emergency at ACI after a prison riot, and to transfer the troublemakers to out-of-state facilities (an action that directly contravened Pettine's earlier Gomes decision prohibiting such transfers without a due process hearing). Conditions at the ACI continued to improve rapidly in most areas.

By 1981, the maximum security institution, "Supermax," posed one of the few remaining serious obstacles to compliance. The existing building was too small--it was designed to house 96 prisoners. Currently Rhode Island had 250 prisoners in need of maximum security detention. Nor was it clear that a new building, when completed, would solve the overcrowding problem. The expense of the added correctional officers needed to man the complex would increase the strain on prison budgets, and it was uncertain whether 241 qualified correctional officers could be found.

Judge Pettine first granted the state an extension of time for closing the old maximum security unit. After this extension, the state agreed to

close the maximum security unit when it opened the new Supermax, but the needed alterations in the new facility now made it apparent that the Supermax would not be ready for several more years.

Rhode Island did try to address this problem. A bond issue to pay for the changes and an expansion of Supermax was placed on the Rhode Island ballot in November 1979 and June 1980, but both times it was rejected by the voters. The state proposed that it reopen the old maximum security building, but that idea was turned down by Judge Pettine. The judge finally agreed to keep the old building open until 1984 with "grave misgivings and reluctance," but demanded that the building be renovated. In 1982 Governor Garrahy proposed another bond issue, which would have raised $8.5 million for corrections, much of which would finance physical improvements at the ACI. That referendum was defeated, however, the only one of seven issues on the ballot rejected by the voters. Meanwhile, the state sought permission from the court to continue to use the century old maximum security units at ACI in order to alleviate overcrowding at the institution. That effort met success in June 1982 when the parties to the suit agreed to keep four cellblocks in temporary use.

Conclusion

Six years after the entry of a systemwide reform decree concerning the Adult Correctional Institution in Rhode Island--and more than thirteen years since the prison's conditions first came to the attention of the federal court--major improvements have been made in both the conditions at ACI. Although many of Judge Pettine's standards have been met, there remain several

areas, notably in the treatment of housing of maximum security prisoners, where less than complete success has been achieved. Prison issues seem to occupy a permanent place on the public agenda in Rhode Island, and the federal court may continue to deal with these problems for years to come.

Part 2. The Impact

In his August 10, 1977 decision in Palmigiano v. Garrahy, and subsequent enforcement orders, Judge Raymond Pettine promulgated the minimum standards that would have to be met before the conditions in Rhode Island's Adult Correctional Institutions were consistent with the dictates of the United States Constitution. Those standards governed

both the conditions in the ACI and the way in which the ACI was administered.

Pettine's decision included substantive and procedural provisions. Substantive elements included the closing of the maximum security facility, meeting health and sanitation standards in remaining ACI units, renovating remaining ACI buildings, expanding mental and physical health programs and providing more job opportunities for inmates. The procedural elements included reform of the classification system and the segregation of pretrial detainees from convicted inmates.

Significant progress has been made by Rhode Island in meeting both sets of requirements. In 1982 Allan Breed, formerly special master in the litigation, described conditions at the ACI as better than at most other prisons around the country[13] Corrections Director John Moran declared at that time that there was not another prison where the governor of a state could tour its facilities in relative safety, as did Rhode Island's Governor Garrahy.[14] The number of inmate lawsuits at ACI has markedly declined from the number filed in the years before the Palmigiano decision.

Progress at ACI has been rapid, if measured by the usual standards in reform litigation, as most of Judge Pettine's requirements were met within a year of the decree. When confrontation between the corrections department and the federal court over reclassification of inmates led Judge Pettine's to set a deadline of May 1978 for completion of that task, the state corrections department changed course and completed the reclassification by deadline. The physical

renovations in the prison ordered by Pettine were generally finished rapidly, with federal and state financial assistance after the Rhode Island legislature first balked at providing money.

To be sure, there are still many criticisms of the conditions at ACI. Inmates say that some of the jobs that are made available to them are "not meaningful". One observer, the Reverend Wesley W. Stinson, has charged that many of the changes made in the facility under John Moran's tenure have been "cosmetic", and there has been continued controversy over the involvement of the federal court. Moreover, many corrections officials in Rhode Island remained convinced that Judge Pettine has an unrealistically optimistic notion of how quickly change can be accomplished. The judge himself admitted in 1982 that conditions in ACI's maximum security unit did not meet constitutional standards.

It is this section of the prison, reserved for inmates who have committed the most dangerous crimes, that remains the major problem area. Judge Pettine's original decree called for closing the old maximum unit and transferring its inmates to the new High Security Supermax, which was scheduled to be finished in 1979. In view of the short time in which the old unit was expected to be used, Judge Pettine ordered that the old unit only be made "habitable", and he ordered made only those physical improvements that were "economically feasible and practicable".

But circumstances required that the old unit be used much longer than originally expected. By 1980, severe overcrowding at ACI meant that the old maximum unit still had to be used to house the overflow,

and unexpectedly high prisoner totals made the nearly completed Supermax facility too small. Designed in an era of smaller prison populations earlier in the decade, Supermax could not house the several hundred prisoners requiring maximum security confinement within that year. The corrections department planned to remedy the problem by expanding the capacity of the Supermax by January 1984, but this delay required continued use of the older maximum unit, which technically had conditions that were worse than the law allowed.

One cause of the overcrowding at ACI was the the state's classification system. More than 40 per cent of ACI inmates, a larger percentage than in many other states, were said to need such confinement. Special Master J. Michael Keating suggested that that e data indicated that Rhode Island was classifying too many inmates as being in need of maximum security.[15] The overcrowding was compounded by the need to relocate those inmates who were confined in areas undergoing renovation.

Overcrowding also was caused by other factors beyond the control of the courts and corrections officials. The number of prisoners sentenced to the Rhode Island correctional institutions dueing the period of ACI renovation was one factor. Between 1979 and 1981 the population in the ACI increased 42 per cent and in 1980-81 the Rhode Island prison population increased 33 per cent over the previous year, far above the national average. Between 1977 and 1981 the number of pre-trial detainees doubled, and those indiviuals also had to be housed in ACI.

Overcrowding was also caused by an increase in the rate of violent crime in Rhode Island, and stricter sentencing policies. With regard to pretrial detainees, Special Master Keating concluded that "the 90 per cent increase within the year (1980-81) of the pretrial detainee population is attributable almost exclusively to judicial response to the popular clamor for sterner measures against the perceived escalation of crime". Although these causes of overcrowding were by no means unique to Rhode Island, the role of ACI as a multi-purpose penal institution serving the entire state meant that it was more intensely subject to these trends.

Federal support reductions and difficulties with the state legislature also hindered compliance with all of Judge Pettine's standards. Elimination of the Law Enforcement Assistance Administration (LEAA) by the federal governmenmt resulted in the loss of $50,000 that that agency provided the state. In 1981 the Rhode Island legislature, upset with the large amount of overtime costs that it already had paid in previous years, severely curtailed its appropriation for prison guard overtime salaries Governor Garrahy imposed severe restrictions on all state spending, including expenditures for prisons, for the 1982 fiscal year. Other fiscal setbacks for the corrections department for example, the high cost of food and medical care for the unexpectedly large number of prisoners at the ACI--raised fears that compliance with some of Judge Pettine's 1977 order might unravel. Thus, the cost of court-ordered reform became an increasingly serious worry to public officials in Rhode Island. The state corrections department proposed several changes in the

court decrees in order to make ACI more cost effficient. These included postponing the opening of a new Intake Service Center, eliminating of planned improvements in certain cell blocks, foregoing many other prison improvements ordered by the federal court, and cutting back 59 staff positions involving recreational research, mental health, drug abuse, vocational, and educational programs. Judge Pettine recognized the need for fiscal retrenchment, but, according to Special Master Keating, planned to force the state to operate constitutionally adequate prisons, no matter what the cost. Given these and other difficulties, said Keating, the involvement of the federal court in the administration of the Adult Correctional Institutions was both "inevitable and essential".

Impact: Administration

Implementing Judge Pettine's reform decree necessarily required significant changes in the administration of ACI and the Department of Corrections. In this regard, Rhode Island was fortunate to have hired an exceptionally able man to head its correction department. Under John J. Moran the department great changes were mader to cope with the challenge put before it by Judge Pettine:

> Within 18 months Moran had met most of his requirements, including: bolstering medical services by hiring a psychologist, a full-time prison doctor, several part-time dentists and a medical coordinator; increasing the number of inmates in work-release programs from 26 to 70; increasing the number of men in the Minimum Security Facility from 56 to 125, and, for the first time, allowing these inmates to work outside the facility; enlarging and improving the quality of prison jobs to the point where nearly all sentenced inmates have work

> assignments; improving and enlarging recreational, counseling, vocational and academic programs; initiating a new intake and orientation program; beginning in-service training for guards; starting a drug unit; reducing the protective custody population from 135 to 35, and providing a semblance of programming for these inmates; and streamlining the disciplinary process to the point where infractions are heard within 48 hours by a disciplinary board.[17]

Moran become involved in almost every aspect of life at ACI, from "ordering sheets" to checking "why tomatoes weren't in salads."[18] He reorganized the corrections department and made many personnel changes among the corrections staff, which he thought contained too few "professionals". Moran made a single corrections official responsible for the administration of the entire ACI (Previously, individual programs at the facility were operated by different corrections administrators). No longer would privileged inmates be allowed visits by girlfriends, to hold champagne and caviar parties, be given special furloughs to visit friends or be granted leaves from their cells to perform construction duties on the homes of correctional officers. The new corrections chief also transferred inmate troublemakers to prisons in other states. Moran broke the power of the correctional officer union, accustomed to having its way at the ACI during the tenure of Bradford Southworth, by suspending guards accused of brutality against inmates and Moran won concessions from the unions during contract negotiations.

The appointment of Director Moran was directly traceable to the litigation. To many observers Bradford Southworth seemed incapable of successfully implementing many of Judge Pettine's decrees, and he was

fired because he was an impediment to change. Moran reorganized the Rhode Island corrections department so that the corrections department could comply with the court decrees. "I can't think of anyone who has done as much in as little time as John Moran", said a Rhode Island official. "He's taken an impossible situation and through brains, planning and toughness turned the whole thing around. We've all been astounded."[19]

But Moran's strong, autocratic style also was well-suited to working change in the Rhode Island's corrections bureaucracy. The corrections department was small. The state ran only one prison, so Moran could easily deal with problems that arose. And his previous experience in New Mexico had taught him the importance of keeping corrections matters in the hands of apolitical adminsitratoprs.

Still, the implementation of Judge Raymond Pettine's Palmigiano decree was impeded by matters beyond the control of either Moran or Judge Pettine. The overcrowding at ACI frustrated full compliance with the reform decree. And halfhearted support from the legislature and declining federal revenues made paying for the court reforms difficult.

Although court intervention may thaw the long frozen wheels of public bureaucracies, it does so at high cost. Intervention has substantially reduced the discretion of by prison officials, making more subtle changes in the prisons difficult, and frustrating attempts to quickly change policy without prior court approval. Director Moran has complained the court required so many changes in the role of the corrections administrator that " the next thing you know we'll be

required to serve each inmate in top hat and tails." He also faulted the court for its warped sense of priorities and its unrealistic timetable for compliance. Every administrative detail, he complained, was treated by the court as though it were a constitutional right. Moran insisted that some of what the plaintiffs advocated and the court decreed worked to the disadvantage of prison inmates, in part due to the ignorance of court and attorneys with the realities of prison culture.[20]

The plaintiffs asked, for example, that some prison programs for inmates be expanded beyond the capacity of ACI administrators to insure the safety of the inmates participating in them. Many inmates, said Moran, were eligible for work-release programs according to objective criteria, but only someone with a "feel" for prison life that came from experience would actually know if such inmates were really ready for work-release. Criteria imposed by the plaintiffs or the court would free these men while there remained a danger that they would commit more crimes. Moran supported the responsibility of the court to protect inmate rights and to examine the classification system at ACI, but he resented the intrusion of the court into his professional autonomy. He said that

> ... we do not believe that the court or Mr. Keating can tell us that we have to have more than 100 inmates in maximum custody. That is not, in our view, a constitutional issue. Rather, it is a philosophical issue. The court shouldn't be involved in this.[21]

ACI administrators now spend a great deal of their time responding to court directives, observing court mandates, and attending to the variety of other legal maneuvers that now characterize much of Rhode Island jail policy. One attorney for the plaintiff inmates said that corrections officials in Rhode Island have grown defensive, fearing that they will be slapped with a lawsuit every time they "blow their nose".[22] Director Moran said that he believed that after five years of court supervision the time had come to give the corrections department an opportunity to improve the ACI without constant court scrutiny.[23]

A critical role in the administrative response to the ACI litigation, as in the New York City jail case, has been played by the correctional guards. Rhode Island has a long tradition of active guard unionism, and this activism, along with the organizational problem of controlling correctional guards who sit a the bottom of the prison hierarchy, have made the actions of individual correctional officers difficult to change by court order alone. Here, too, much has changed. After initial opposition to court involvement, the general improvement at ACI has shown the correctional officiers that guard militance can be counterproductive. The attitude of the guards has improved. Court involvement is no longer openly resisted, and the Morris rules, which are still in effect, are no longer derisively referred to by the guards as "Pettine's rules".

Moreover, many correctional officers realize that the court may not have undermined their authority. The guards no longer fabricate mass

sick days in order to accumulate overtime salaries for those who replace them. Guard acquiescence to court oversight has even affected labor negotiations. There has been a decline in guard militancy, and the correctional officers union no longer presents demands in negotiations with the state that, if granted, would result in violations of the court's remedial orders.

Yet opposition still remains. Some guards continue to believe that the court has undermined their ability to maintain order at the ACI and their ability to protect themselves, and they will continue to treat inmates brutally out of a belief that they are protecting themselves. Judge Pettine--or any judge--who seeks to change guard behavior in ways that appear to impede the guards' ability to maintain order and insure their personal safety will inevitably find the task of reform difficult.

Impact: Political

The ACI litigation in Rhode Island helped set the political agenda in that state. Significantly more attention is now given to corrections issues by the governor of the state and the legislature than ever before. Judge Pettine's reform decision itself was a major political act, leading to a change in the spending priorities of the state legislature.

Special Master Keating said that one effect of the litigation was to force the state to alter its priorities by giving prison issues a higher priority. Moreover, had not Governor Garrahy acted first, Judge Pettine

himself would have committed the highly political act of removing Bradford Southworth. More subtle political consequences also resulted from court activity. While Governor J. Joseph Garrahy first publicly criticized Judge Pettine's reform order, he privately pressed corrections administrators to improve conditions at the Adult Correctional Institutions, and later came out publicly in support of reforming the ACI.

The most important indicator of the increased prominence given corrections issues in Rhode Island since the litigation is the growth in the corrections budget. Total expenditures by the department of corrections in 1977-78, the first year after the court order, were 29 per cent higher than in 1976-77, the year before the Palmigiano decree. Moreover, since 1978-79 the money spent on the division of adult services of the corrections department, the branch of the department directly responsible for the administration of the state's penal institutions, increased despite an overall decline in spending by the corrections department. In 1980-81 spending for that division comprised 80 per cent of all spending by the corrections department. In 1976-77 the figure was only 46 per cent. Spending per inmate for medical care in 1980 was the highest in the United States, $1670, a sum attributable to the Palmigiano litigation.

The political character of the litigation also has stimulated a backlash, as there has been significant political opposition to increased spending on corrections. Members of the Rhode Island legislature widely criticized Judge Pettine's intervention in the

state's prisons; and when the legislature balked at giving more money to corrections, many ACI administrators thought that they were being punished. Pettine himself was often villified during the early stages of the litigation by the members of the civic groups to which he belonged. Prison reform has attracted little support from the voters. Moreover, the defeat of several prison bond issues by the electorate in the years after the litigation may be due to voter resentment of Pettine's active role in the ACI litigation (as well as to the general reluctance of many voters everywhere to increase spending on the prisons).

The press served as a useful means of placing the corrections issue on the political agenda. "You get a lot of press from going to court", said one of the attorneys for the plaintiffs. A lawyer in the state attorney general's office agreed, saying that the state helped set that agenda by keeping prison issues on the front page.[24]

Impact: Process

Before the lawsuit, only a few legislators in Rhode Island were concerned about improving conditions in the ACI. The issue received little attention from the governor and the legislature, and the public at large gave nary a thought to corrections matters. Only those directly involved in the issue, corrections administrators, the correctional officers union, and the imates themselves, sought to shape corrections policy.

Court intervention has changed this pattern of decision making, granting a strong role to public interest lawyers seeking change at the prison. These lawyers have helped shape the remedy and bargained with state officials over prison-related problems that often arise. They serve as a conduits through which inmate grievances can be channeled to the court and monitor of the progress of change at the ACI.

Reform litigation is often undertaken in the name of opening up the system to minority groups--indeed that is sometimes cited as one of its justifications. Ironically, the activity of the legal aid attorneys that represented litigants in Rhode Island resulted in less power for the inmates themselves. As the suit enlarged their influence inmates had fewer opportunities to communicate directly with the court or with members of the legislature, as happened before the suit had matured. Since his appointment, Moran has refused to talk with inmates about their grievances, and his autocratic administrative style forced inmate unions to disband. The plaintiff's attorneys, nevertheless, say that they carefully try to assess the preferences of the inmates before they appear in court.[25]

The participation of most elected officials and the public at large remains indirect. The state legislature wrangles over the cost of corrections. The public occasionally expresses itself on the issue at the polls, but does little else. Only Governor Garrahy remains an exception to this tendency for those not intimately involved in jail to defer to the decisions of the court, the legal aid attorneys, or corrections executives.

After almost a decade of turmoil, the case has come to acquire a life of its own. Legal aid attorneys have no incentive to relinquish the powerful role they now play. They bring inmate grievances to the court even if these are unrelated to the original lawsuits. The shortcomings and lack of coordination endemic in the delivery of all public services means that new examples of deprivations of rights can always be found and brought to the court. And many of these complaints are frivolous and needlessly time consuming--such as inmate claims that the three pairs of underwear that they misplaced must be recovered or a prisoner seekimg renumeration estimates that the the value of each of his paintings is $1000.

Judicial involvement in the Rhode Island prisons also has increased the importance of professional penologists. Judge Pettine consulted with various prison experts around the country when devising his remedy. He employed psychiatrists to inform him about drug problems in the facility and psychologists to advise him on classification issues. Other experts on all aspects of prison administration also reported to the court.

Judge Pettine relied frequently on these experts due to his own unfamiliarity with penology. One attorney described the judge's attitude toward prision reform as, "I won't go very far, unless I can hang my hat on something.'[26] Yet the services of such witnesses were not universally valued. Director Moran later described the experts in the case as "prostitutes" who knew little about how to administer a prison. He disliked their "meddling" on prison issues.[27]

In large part, however, the court attempts to reform the Rhode Island prison system have been successful. Rhode Island's small prison system, and good fortune in hiring an exceptionally able man to run that system, have been important factors contributing to that success.

Yet compliance is by no means complete. Prison improvements are constantly endangered by a growing inmate population, up 23 per cent between 1981 and 1983, and the state's fiscal difficulties. The correctional officers, now quiescent and responsible for implementing many court reforms, may become more active if their salaries or workinmg conditions are jeopardized.

Finally, the momentum for reform of the ACI now seems to have spent itself. What is taking place now in Rhode Island resembles the evolution of reform litigation in the other three case studies: prolonged court oversight in the cause of increasingly small gains; the continued importance of plaintiffs' attorneys in aggregating complaints about the institution and raising them in court, and the imposition of considerable administrative complexity as a result of the the continued presence of the court and the attorneys. When will it end? There do not yet exist accepted principles for disengeament from reform suits, or for distinguishing between constitutional minima and optimum levels of service. Developing such principles is vital if reform suits are to secure social change within the firm limits of understandable law.

VIII. Court Reform of Public Institutions: What Determines Impact?

Court intervention in special education systems and prisons has varied consequences. The quality of services offered usually improves, although not as much as desired by the court or the plaintiffs. The public bureaucracy responsible for delivering a service--administering a jail or a special education program--frequently changes in order to perform its tasks more efficiently, but administrators often complain that court intervention diverts their attention away from efficient administration toward satisfying legal rules. They also say that lawsuits excessively narrow their discretion, crippling their capacity to innovate.

Court attempts to reform public agencies invariably place the matter on a political agenda--for instance, by forcing the legally responsible officials to devote time, fiscal or political resources to its resolution. The press often plays an important role in setting the agenda by heightening public awareness of the issue.

Finally, judicial involvement in reform efforts affects how policy gets made. Legalization, the process of resolving problems through invocation of general rules, adherence to regular procedures, and the like, becomes a dominant policy framework, framing problems and sometimes suggesting solutions. As the process evolves, the role of lawyers is strengthened, especially those representing litigant groups which habitually use the law to secure social change. And the court itself tends to become a permanent actor in the policymaking of the issue area. The discretion of those responsible for service delivery s is correspondingly reduced, as is the professionalism, bureaucratic, or

political values they espouse. Professional special educators are less free to resolve problems on the basis of the particularistic issues raised in a given instance. Bureaucrats are less able to operationalize vague mandates of authority by responding to organizational imperatives. Mayors, governors, and legislators can no longer make re-election, the preferences of their constitutents their only concern.

Yet puzzles remain. Why can such conditions as filthy jail cells be changed through reform suits with comparative ease, while courts cannot compel guards to change their behavior? Why is it that interest group activity is high in the special education cases, but much less in the jail cases? And can the extreme length of time necessary for reform litigation be explained?

The studies in this volume of institutional reform litigation over time and across issue areas lead to the conclusion that there are four major determinants of the impact of such suits:

1. Issue: every institutional reform suit apportions perceived costs and benefits between the intended targets of change (a jail or a school system), and other affected populations (parents of handicapped children, inmates, or the general public). This distribution of costs and benefits affects liklihood of successful reform and also gives a better understanding of the politics and policymaking in the issue area;

2. Organizational setting: the organizational structure and the quality of administration exhibited will shape impact;

3. Professionalism: the presence of a professional culture in the issue area may lead policy participants to frame problems in a way that

minimizes or conflicts with legal values, possibly frustrating compliance.

4. Environmental factors: the political, social, and economic factors in which the organization exists can determine whether court-mandated reform will be achieved. To be successful, institutional reform must have political support and there must be enough money to pay for the ordered changes.

The case studies show us that these four determinants often are significant impediments to change, and that, consequently compliance reform decree is likely to be imperfect.

I. Issue

Public policies allocate costs and benefits. Costs, usually expressed in monetary terms, are burdens that someone or something must bear if a policy is adopted. Benefits are any satisfaction that someone or something will enjoy if a policy is adopted. A typical cost associated with a public policy is higher taxes; a typical benefit is the military protection that is purchased with those taxes.[1]

But perceptions also matter. Having more tanks or airplanes may not actually result in a more secure nation, since any potential adversary may match the spending on such weapons. Neveretheless, some Congressmen appprove greater defense spending because they believe that the United States will be better protected as a result. Costs "and benefits are what people perceive them to be"[2], says James Q. Wilson, emphasizing

the importance of citizens' perceptions in determining political activity.

Institutional reform decrees, an example of a public policy, also can allocate or appear to allocate costs and benefits. The costs imposed by such legal actions can include such things as school busing, the taxes used to pay for cleaner jails or for additional special education programs. Benefits may include cleaner jails, more spacious cells, and more students enrolled in special education programs. But perceptions also are critical in institutional reform litigation. It matters less whether institutional reform suits actually allocate costs and benefits than it does that people <u>believe</u> that policies will yield such results.

Institutional reform decrees will always appear to impose costs on the public agency that is the target of change. School systems offer new programs or seek out unserved handicapped children. Corrections officials must change the programs offered to inmates, cease reading prisoner mail or observe new procedures when searching inmates. More generally, the costs for target organizations may include improving service levels, altering standard operating procedures, or coordinating the activity of disparate organizational subunits. These costs are measured by changing organizational behavior (which is difficult) improving service levels (which may be impossible), or increasing budgets(which is a matter beyond the direct control of the organization's managers).

Reform litigation also may impose costs and benefits on those outside the litigation. For example, many parents who have not participated directly in busing litigation may believe that busing plans subject children to hostile environments, destroy the "neighborhood" character of schools, or have other pernicious consequences; they resist cooperation with the provisions of court ordered busing plans as a result. In other cases, reform litigation promises to distribute benefits well beyond the immediate target of the suit. In special education litigation, for example, such suits promise to enroll thousands of additional children in school and to open up the educational system to the direct participation of parents in evaluation and placement decisions. Yet these parents and children are not involved in the original litigation that brought about such change.

Sometimes the costs and benefits of perceived change are confined to the immediate target of the litigation and not distributed beyond it. In the jail suits in New York City and Rhode Island, for example, court ordered reform plans promised benefits to inmates. Citizens not in jail have only the most indirect concern with corrections. Suits to reform publoic housing agencies or mental hospitals also confine most costs and benefits to the puiblic agency plaintiffs hope to change.

Examining how costs and benefits are allocated in reform suits can do much to help understand the politics of reform litigation. When costs are borne by the organizations or officials who are not the immediate target of the court's reform decree, or not affected directly by its outcome, achieving change can be difficult. Full compliance will

require these individuals and organizations to cooperate when participating in the suit. If they see no incentive to do so, they may resist reform. In school busing cases, for example, the opposition of many parents to the transportation of their children for racial integration has frustrated the court's attempt to racially balance the schools.

When reform litigation promises benefits to populations beyond the target organizations, achieving change may be easier. In the two special education studies, the promise of greater educational benefits for handicapped children in Pennsylvania and New York City caused parents and legal aid groups to put legal and political pressure on the Commonwealth of Pennsylvania and the New York City Board of Education to expand their offerings and to offer services to additional categories of handicapped children. Their participation continued during implementation. The perceived benefits gave them incentives to participate in the due process system and to continue to file suit in court about problems that arose.

The interest group activity associated with issues that distribute costs or benefits beyond targeted public organizations can be high. When the social costs of compliance are perceived intensely by people who are not participating in the litigation, they may organize to resist implementation. Parents form groups to pressure school leaders and school principals in resisting the court or they hire attorneys to intervene in court on their behalf. The court involvement itself may be perceived as illegitimate. The Legal Aid Society in New York City, the

Pennsylvania Association of Retarded Children and many other groups organized to assert legal entitlements. We already have noted one aspect of the policymaking process that accompanies this high level of activity: the case lasts for several years and these outside groups become a permanent part of the policy process, as new problems are brought to court and interest in the issue continues. The groups themselves play an important role in implementation.

When the costs and benefits of reform litigation are confined to the immediate target of the suit, as in the two jail cases, change is less dependent on the support of outside groups. Such groups do not clamor to participate in policymaking, and outside interest group activity is low. In these instances the role played by lawyers and administrators in implementing the reform decree is especially important. Public interest law firms become important participants, since the low incentive for social groups to participate gives these attorneys substantial autonomy to make decisions regarding trial tactics and strategy. For example, the public interest law center that filed the original lawsuit in Rhode Island at the behest of inmates continued to work on the case even after inmate power at ACI had been broken by Commissioner Moran. In New York City corrections issues had rarely generated much political activity; only the activist attorneys who claimed to represent inmates continued to litigate jail issues into the 1980s.

In practice, however, because every reform suit is designed to change the workings of a public organization, it inevitably impose costs

on imposing costs on the public officals working within it. Although some administrators may welcome the way court intervention removes obstacles to making service improvements, few administrators regard the organizational changes necessary for achieving such reform as anything but a burden. Only exceptional administrative leadership, such as that displayed by John Moran in Rhode Island, can force middle and lower level bureaucrats to change in the desired manner. There are no parents groups complaining about the services their children are receiving, or about implementation; lawyers, believing that they represent large plaintiff classes, do it instead.

Since all reform litigation reallocates costs and benefits, such reform is inevitably a political process, involving parents, inmates, legal aid attorneys, bureaucrats and judges all all with different stakes in the outcome and different perceptions of what is to be done. Agencies vitally involved in the delivery of public services may seek to join these groups in trying to influence the final shape of a reform decree. The result is a distinctive kind of judicial client politics, with the courtroom the main focus of activity and the perceived costs and benefits at stake the principal factor determining the shape that client politics will take.

Organizational Setting

The working of public bureaucracies can affect the success of reform litigation. Low-level correctional officers may disregard court guidelines for treatment of inmates, bureaucratic inertia may free special education bureaucrats to settle for less than the "appropriate" education required by law, and faulty coordination between special and "regular" bureaucracies may give handicapped children an entitlement that is less than what the court mandate. The characteristics of public organizations that determines the outcome of reform litigation fall into three categories: the structure of the public bureaucracy or bureaucracies that a court seeks to change; the operations of those bureaucracies; and the relationship between the court and those bureaucracies.

Bureaucratic Structure

The hierarchical integration of a public organization affects the implementation of institutional reform. In order to be effective, court directives to executives must be translated into orders that are filtered downward in the organization. In a hierarchically organized bureaucracy, such as custodial prison systems, directives must be filtered downward from the executives in the corrections department to the wardens of individual institutions and, ultimately to correctional officers who must control the inmates.

But most public organizations are not rigidly hierarchical and have structural complexities that make changing their behavior considerably

more difficult than this idealized model would suggest. School systems have decentralized regular education bureaucracies next to centralized special education bureaucracies, and the classroom teacher possesses considerable autonomy. In jail settings, the lowest level operator in the prison system, the correctional officer, performs many duties that are not routine and hence are also unlikely to be easily changed. Orders issued to prison guards from above cannot anticipate the unpredictability of daily prison life.

An organization's mission, that is, its "distinctive and valued set of behaviors", may also thwart change.[3] Special educators are influenced by training that emphasizes the application of expertise to individual cases, they are likely to resent--and resist-- court rules that constrain their discretion. Career corrections officials who see their mission as controlling unruly inmate behavior are unlikely to enhance court reform decrees which appear to undermine their authority or which cannot help them quell a jail disturbance.[11] School principals may see their administration of a school as authority that is absolute, and not subject to challenge in court.

Successful change will depend on whether a court takes into account the power structure of an organization--who is in a formal position of authority, who has access to necessary information and control over needed resources, and other facts of bureaucratic life.[4] In prisons, correctional officers unions often have wielded great power over inmates and in Rhode Island inmate unions themselves controlled much that happened in the ACI; individual correctional officers may use threats of

force in order to keep order in the jails, since they have no weapons. In special education, school principals have enormous influence over the delivery of special education services to the handicapped, and who receives it. Yet guard unions and correctional officers often have been ignored by judges seeking to improve jail conditions, and judges usually do not consider the role of administrators in the individual schools in special education cases. This neglect of power relations within the public organization leads to continued noncompliance, because court orders give no clear direction about how these middle and lower level bureaucrats are supposed to behave. Almost inevitably, new grievances are engendered that all parties bring back to the court.

The loose coupling of school systems--that is, the weak organizational link existing between educational structure and actual school activities--leads judges and plaintiffs to focus their reform efforts on structural aspects of special education. As the case studies demonstrate, court orders focus on the availability of programs, enrollment figures and staffing patterns. Judges seeking to reform school systems will look at such evidence of unworkable and immediate change, think that more has happened than is actually the case and will expend very little effort in determining whether handicapped children actually are learning anything ;in fact, that may be impossible to determine with any precision. Meanwhile, parents of the children complain that they have inadequate bus service, or that their child is still on the waiting list for special education services. Underlying the entire waiting list controversy in Jose P., for example, is the

assumption that if the city succeeded in the formal task of eliminating the waiting lists much of the city's legal obligation to the handicapped would be met. In fact, removing students from the waiting lists and placing them in classes often can be accomplished rapidly and without much evaluation. The court and the plaintiff's attorneys continue to look at the length of the waiting lists as amajor indicator of compliance. They devote less attention to the more important educational issues.

Yet a special education system that is the target of legal reform is also able to assimilate legal rules more easily than other kinds of organizations. Loosely coupled organizations, like educational systems, can adapt more easily to the centralizing effects of the court rulings than can tightly coupled systems, such as prisons, because "they can more easily deal with impossible or inconsistent centralizing constraints by the avoidance of implementation and the ritualization of implementation."[5] Much of what schools are about--teaching children--is affected little by personnel changes at the district level or consent decrees that bind the state department of education. Life in the classroom goes on regardless of what happens in the courtroom.

The tendency in loosely coupled organizations for administration to be detached from the services the organization actually provides also leads to an emphasis on the formal and observable as evidence of progress toward compliance. Since no one knows for certain how to improve the educational achievement of the handicapped, trouble may follow if reporting requirements are not met. "In loosely coupled

settings, administrative tasks involve less the management of technical work than the management of relations within the environment according to institutionally required rituals."[6] The timely submission of compliance reports by a public defendants is one of the most hallowed of rituals in reform litigation.

Another structural characteristic of public organizations is the dispersal of authority and responsibility among several bureaucracies and levels of government. This, too, may shape the outcome of reform litigation. Suing a state department of education does not encourage local school district officials to work for reform; and suing a local school district may not lead a state to exercise its legal responsibilities in monitoring compliance with education laws. The "resources and authority" necessary to secure and institutionalize the changes set out in a court remedy are distributed among many bureaucratic units.[7]

This fragmentation of authority makes change harder to achieve. Fragmentation associated with federalism disburses responsibility for the delivery of a social service among federal state and local levels of government. In corrections, the operation of penal institutions can be either a federal, state, or local task, but the cooperation of all three levels of government is critical if constitutional standards are to be attained: federal money is needed if state and local prisons are to be effectively administered, while state prisons can sometimes help localities reduce jail overcrowding.

Fragmentation associated with the separation of powers also complicates the task of reform, distributing responsibility for delivery of services to the handicapped or places the operation of jails in the hands of more than one political branch. While a corrections department may wish to improve conditions in its jails and a school district may wish to serve more handicapped children, changes can be made only if the legislature or city council appropriates the necessary funds. The support of court-ordered reform by a mayor or a state governor may be important to the implementation of changes, as shown by the two New York City cases and the Palmigiano litigation.

Fragmentation in bureaucratic organization may also hinder change. Sometimes the bureaucracies themselves are split into many line and staff offices or committees with competing responsibilities. The bifurcation of educational bureaucracies into "regular" and special educational systems--each organized around differing principles--is but the most obvious example of how bureaucratic fragmentation can complicate implementation.

Court intervention in social policy itself also can encourage fragmentation. The intervention of the courts into educational and correctional settings diminishes the authority of school superintendents, corrections executives and wardens. The size and complexity of the organization increase as subunits within the organization attempt to govern their behavior according to the external standards decreed by the court. The result is an organization whose bureaus are as concerned with observing external rules as they are with

the performance of subordinates or the directives of their executives. Sometimes the need to change to conform to court dictates causes vertical integration to decrease, as new bureaus are formed to deal with the court requirements.

Thus, special education bureaucracies must coordinate their activity not only with "regular" education bureaucrats but with the requirements of court decrees and with those who monitor the implementation of those decrees. Officials hire new staff to cope with court ordered requirements, shift seasoned correctional officials to address the demands placed on the system from the outside, away from their traditional task of exercising authority over the prison guards

That some social services are delivered by several public organizations also may be an obstacle to reform. One study of the implementation of PL 94-142 found that some state agencies have withdrawn their services to handicapped students after the passage of the federal statute, assuming that the schools would automatically provide the services that formerly their responsibility.[10] Competing responsibilities thus may lead to policy that is uncoordinated and change that is sporadic or incomplete: correctional officers work at cross purposes with corrections executives and regular executives resent the new demands of special education professionals for a greater share of fiscal resources.

Courts usually have not taken this organizational fragmentation into account in their reform decrees. The target of most intended

reforms are the executives of an organization,--not the various administrative subunits within it, or middle level bureaucrats and elected political leaders whose responsibilities are less direct. Their duties are not directy specified in the court order. Judges can identify the essential parties whose support can make change possible, but they must do this without clear guidance from either legal rules or established practice. Often they do not know enough about how an agency works to take into account such complexities.

Bureaucratic Operations

The tasks of an organization[11] affect the court's ability to reform it. State education commissioners such as Pennsylvania's John C. Pittenger in the PARC litigation may think that the primary responsibility of education officials is to serve regular students, and so may resist court pressure to expand services to the handicapped. Corrections bureaucrats may believe that their major task is to "get criminals off the streets", and view court attempts to improve jail conditions as interference with that goal.

Routine tasks that public officials perform often can be most easily changed by the courts because they "involve little discretion, they can be controlled by providing a detailed set of specifications or 'program' describing how the tasks are to be performed".[12] Correctional officers routinely produce pretrial detainees in court,

wardens inspect jail and prisons; state education officials routinely process the paperwork generated by due process appeals.

Much of what reform litigation seeks to change is not routine and is for that reason difficult to control. In the Jose P. case, requiring a prompt evaluation of each handicapped child necessitated that and prolonged observations be made of thousands of the city's pupils--hardly an easy task for New York city special educators, and one that was certainly not routine. The PARC due process regime tried to introduce regularity into the diagnosis and placement decisions of the Commonwealth of Pennsylvania. However, insuring that the educational prescription was "appropriate", as required by law, required that an inquiry into the circumstances of each individual case. Similarly, corrections officials must undertake all kinds of discretionary tasks every day: when conducting searches of inmates and their cells, when confiscating property, and the making the detailed determinations of fact concerning individual inmate behavior that are the prerequisite of a properly functioning classification system.

One study of a Massachusetts law very similar to Pennsylvania's PARC settlement found that the mandate to serve the handicapped created vastly increased paperwork and added to the workload of special educators. School officials did not have all the staff needed to meet the requirements of the law, including its provision for more detailed education plans, and there resulted an inevitable tension between the values of individualized education and mass processing.[12]

To cope with these demands, education officials in Massachusetts cut corners. They did not assess all the relevant educational needs of their handicapped children and they scheduled assessments of children that were not likely to cost school districts extra money. Officials gave more attention to children whose needs met their specialties, favored group over individual treatment, and did not fully comply with reporting requirements designed to protect the interests of parents. They tried to ration resources and developed other strategies that allowed them to secure their work environment.

Much the same held true in the PARC and Jose P. cases. Pennsylvania's special educators sought to routinize the myriad of problems thaty had to be settled, while accommodating district placement decisions to bureacratic reality. In New York City, teachers tried to secure their environment by "dumping" students who posed threats to classroom control into special education classes, while the board of education neglected the reporting requirements favored by the court as a compliance monitoring strategy.

Court decisions concerning the due process rights of inmates during disciplinary proceedings and decisions establishing inmate grievance mechanisms seek to restrict the discretion that prison guards have long possessed. Yet these court actions, say the guards, undermine the critical tasks of their job: maintaining order in the jails and preserving safety in the institution. Said one penologist who has worked with prison guards, the guard functions "as a manager of violent, explosive men but he's not recognized as a manager. He's only a guard,

a watcher. He's regarded as an individual functioning at a low level. He's expected to go by the book, but the book doesn't work."[13]

Correctional officers have devised, not surprisingly, strategies for coping with problems caused by court reform suits. Judicial orders affecting with the essentials of their job are disregarded if they conflict with the need to maintain order or otherwise jeopardize the safety of the guards.

Another response by street level bureaucrats has been to organize into public employee unions which can act as countervailing forces in the implementation of institutional reform decrees.[14]. Correctional officers unions establish a form of "criminal justice syndicalism" to protest job conditions and the lack of status enjoyed by their members. They oppose the push by administrators and the courts to expand academic, vocational, and other prison programs for inmates, and complain that the courts neglect the professional needs of guards. In education, teacher unions have been organized to press for their interests in negotiations with school districts, and these unions sometimes are not sanguine about court control of the schools. This public service syndicalism has grown in places such as Rhode Island to embrace the formation of inmate unions which insist on participating in decisions about the purposes and methods of prisons. Collective bargaining has brought guards more job security, control over their work assignments and more influence in decision making at all levels of prison administration. Collective bargaining is also a

common phenomenon in education. Many members of teacher unions resent the special status given to education for the handicapped, believing that it diverts needed resources and attention from other educational issues. Teacher unions have also challenged management decisions concerning teacher performance, the use of sick and vacation leave, curriculum development and the use of specialists.

One strike by New York state correctional officers was settled when the state agreed to provide stress training for the state's 11,000 correctional officers. Job actions such as one taken by militant New York City prison guards on Riker's Island can frustrate the achievement of court ordered changes in jail conditions. The Adult Correctional Institutions in Rhode Island had a long tradition of guard activism (and of obstructing court reform), until John Moran's authoritarian rule broke their power--and those of inmate unions--in the late 1970s. Some guard unions have even included modification of court ordered changes as items to be pressed in negotiations with management.

The problems inherent in being a special educator and correctional officer makes changing their professional behavior very difficult. Their occupations call for individual initiative. Those who hold them must interact directly with citizens in the course of their work. The personal and organizational resources supporting them, as with many social service jobs, are limited in relation to the tasks they are asked to perform. And the demand for their services will always be as great as their ability to provide those services.

These impediments to change are especially difficult for the courts to change. Street level bureaucrats tend to routinize procedures, modify goals, ration their services, assert priorities and limit or control their clientele. "In other words, they develop practices that permit them in some way to process the work they are required to do. The work of street level bureaucrats is inherently discretionary."[15] Since the "work objectives" for street-level bureaucrats are usually vague and contradictory, it is almost impossible to devise valid work performance measures for them and the consumers of services are relatively insignificant as a reference group.[16] Here again, it seems that despite the hierarchical organization of many public bureaucracies, orders from the top cannot easily control the actions of street level operators.

Relationship between Court and Targeted Bureacracies

The court's relationship with a targeted bureaucracy affects compliance with the reform decree. This interaction includes the communication between judge and public officials, the resources that public agencies possess to make the required changes, and the dispositions of the implementors in the bureaucracy charged with making ther changes.[17]

Courts are often faulted for their inability to transmit their decisions clearly. The personnel who are responsible for complying with a judicial reform decree must understand what it is that they are

supposed to do. Officials must know how to operationalize the requirement that each handicapped child receive an "appropriate" education, and corrections officials must understand what it is to treat inmates in a "nondiscriminatory" fashion. Other judges do not necessarily read a decision once it is published, and it is claimed that the legal profession itself is a poor channel for the transmission of information. Court decisions are criticized for ambiguity, vagueness, and that each pertains only to the facts of the case. Sometimes judges write their opinions broadly so that legislators and members of the executive branch of government will develop their own solutions. Uncertainty is increased by the focus of courts on only those issues raised in a particular dispute, not on all possible issues that may be germane. Judges also wait until a controversy comes before them before making a decision, and cannot reach out to deal with a controversy before it generates a formal lawsuit.[18]

Many of these accusations have only limited validity with regard to institutional reform litigation. The transmission of information to interested parties is seldom a problem, because of the unusually high publicity that such cases generate. These court directives tend not to be vague, but comprehensive and detailed in character. Moreover, most judges monitor implementation of reform either directly or indirectly. They encourage parties unsure of the meaning of a directive to ask the court to resolve the uncertainties. Communications difficulties in implementing institutional reform litigation lie less in the uncertainty

generated by the original decision than with the need to adapt a decree's provisions in light of new circumstances.

Communication between the presiding judge of a case and public administrators often is inadequate, because the law prohibits the chief executive officer in a public organization from communicating directly with a judge in most circumstances. Messages from the executive to the judge can be channeled through intermediaries, but such messages are subject to misinterpretation and error. Sometimes messages even can be transmitted through the news media, but such efforts are even more liable to distortion.[19]

Other Organizational Factors

The success of court ordered institutional reform depends, in part, on two other properties of public organizations: the resources available to the organization, such as adequate staff and facilities, and the adequacy of the information available to its executives and the court about what is taking place within it.

All public organizations complying with reform decrees must possess adequate staff. There must be enough personnel to achieve change in the public organization and sufficient staff to assist the court in monitoring the decree.[20] In Pennsylvania, for example, the early due process hearings were less successful in assuring the uniformity of outcome that the original PARC consent decree envisioned due to considerable personnel turnover in the state attorney general's office.

Courts also face a staffing problem. Because courts have too few staff to monitor the implementation of their decrees, they frequently use special masters to perform that task or rely on plaintiffs attorneys. Yet even when they depend on outside assistance to help gather information about compliance, court efforts to monitor implementation sometimes are unsuccessful. Judges have difficulty monitoring prison guard behavior and cannot superintend special education placements.

Information is another important requirment securing court reform of social institutions.[21] Such information is of two kinds: public officials must know what they are supposed to do and courts must monitor the response of the target agency in order that court decrees can be enforced.

Yet the lengthy character of institutional reform cases possess distinctive information problems for the trial court and targeted public organizations. Even after a remedial blueprint is developed, information concerning the constantly changing issues that occur during implementation must be gathered. In the Jose P. case, for example, the court may someday have to address many of the long deferred issues concerning the quality of special education services received by New York City's students, and this would require that the court gather and evaluate new data on special education in the city. In Rhode Island, Judge Pettine's continuing concern with facilities renovation and overcrowding at the ACI required that he monitor the size of inmate populations, and the progress of building renovations, even though the

remedy was ordered into effect long ago. In order to manage these complex tasks the court must have access to a continous and accurate flow of information about what is taking place within the defendant public institution:

> implementor resistance... may result in only pro forma(sic) or ineffectual change, or no change at all. But implementation difficulties usually stem... from factors that emerge during the implementation process. Prosaic but nonetheless difficult problems may arise--inhospitable personnel policies, communication breakdowns, changes in leadership or staff for example. Or, once into implementation, unanticipated requirements may surface--for example, need for special training, new facilities or special expertise. Similarly, competing demands on system resources may deflect implementation efforts. Or, the assumed "policy solution" may, in practice, turn out to be misspecified or wrong.[22]

The several ways that courts can acquire this sort of information have already been suggested. Court-appointed masters such as J. Michael Keating and Allen Breed in Rhode Island, or retired Judge Marvin Frankel can perform monitoring duties that assist the trial courts in enforcing the decree.[23] The attorneys in the litigation, such as those in the jail litigation in New York City, can gather information concerning compliance in public sevices and report back to the court. Some combination of these mechanisms can be used by the judge and it can be supplemented by data provided by other public bodies such as the New York City Board of Correction. Unlike appellate judges, trial judges in institutional reform cases possess considerable flexibility to modify their reform decrees, or to issue coercive orders to enforce change in the behavior of defendants; but as we have seen, the organizational structure of a public bureaucracy sometimes frustrates compliance

nonetheless. Moreover, a formal court ordered can only be modified after a hearing, and these are sometimes difficult to schedule due t the courts often crowded docket.[24] It is not surprising, therefore, that some administrators find many reform decrees unrealistic. and "unrelated to the actual operations of institutions"

III. Professionalism and the Issue Area

The outcome of a court's institutional reform efforts can depend on whether the issue is one that has been traditionally dominated by powerful professionals such as special educators and doctors, who view public policies through lenses that differ significantly from that of the lawyer. The conflict among contending norms may result in the resistance of these professionals to change or the warping of a judge's decrees--with the result that there is less of an improvement in public services than a court wishes.

The professional model of decisionmaking focuses on achieving desirable results through the application of expertise to individual cases. "Results rather than principles, discretion rather than rules, and groups rather than individuals are emphasized."[25] Robert Wood, who served as the superintendent of the Boston public schools dueing the implementation of court ordered integration in that city, later described the ethos of "professionalism" possessed by many teachers:

> ...school administration had been regarded as a piece of cake. Its mission was clear: educating and socializing children. It functioned in a separate, autonomous structure, with independent sources of revenue. It was held to be "above" politics, Its

> policymakers, the members of the school board, were thought to be civic-minded laymen, motivated solely by the concern of what was "best" for the students". Professionals in the system were supplied by schools of education and screened by state certification.[26]

The intended beneficiary of a service provided by professionals--for example, a handicapped student--plays a passive role in this system and defers to the presumed expertise of the professional. The professional, in turn, provides the service based upon distinctive characteristics of the individual case before him.

When a "professional" issue is placed on the public agenda it is done so in ways that leave little room for the client to define the nature and extent of the benefit; often the professionals themselves, who often dominate the public agency charged with the delivery of services, define this benefit, and the task of program accountibility in such organizations is carried out by other units of the bureaucracy. This professional approach to decisionmaking has characterized vocational education, and human service settings such as mental health, public welfare and probation.[27] Before the 1960s it was the approach taken to special education.

Legalization, by contrast, focuses on the individual as the possessor of rights, stresses the importance of regularized procedures and the public articulation of values that underlies a decision in order to minimize arbitrariness.[28] Accountibility under this approach rests on the willingness of the individual to police his own interests, including his interest fair procedures. Legalized public decisions can take the form of court action, but need not (The federal special

education statute, PL 94-142, for example, uses legal devices such as the due process hearing to attain its purposes). Many private disputes between citizens are settled through legalization, as are a large number of criminal matters. Prison issues, as we have seen, have traditionally not been the object of legalization, but have been allowed considerably autonomy.

Institutional reform litigation seeks to legalize the workings of the public agencies that are the focus of court scrutiny. In special education litigation, for example, the provision of education services is made liable to parental challenge through the in a due process hearing. To be sure, this legalization was not intended to fully supersede the traditional professional approach to special education--the role of the special educatio expert" was supposed to play a critical role in the system. But the role of the professional was intended to be severely circumscribed by the law.

Judicial reform of special education places the law squarely in conflict with the professional mode of decisionmaking. Frank Macchiarola, former Chancellor of the New York City schools, described to the federal court how how this conflict affected educational policymaking in New York City. The courts, he said, tend

> to misunderstand the nature of the educational handicaps we are most frequently called upon to address and (to overestimate) the capacity of the profession as a whole to identify and remediate poorly defined behavioral difficulties These issues are central to understanding the conflict between rigid time limits and quantitative measures of progress, and to our efforts to develop appropriate, effective, and non-restrictive services for handicapped children...[29]

> The judgment's preoccupation with time limits creates a bias in favor of standardized evaluation instruments and against individualized evaluations based on in-depth observations of the child and consultations with appropriate staff members...
>
> ...The judgment creates a bias in favor of reliance on pre-existing, clinical, diagnostic categories (mentally,retarded, learning disabled, emotionally handicappped) and discourages a more defined analysis of individual problems and needs ...Finally, the pressure of time makes it more difficult to develop programmatically meaningful recommendations for services and thereby insures that the child's educational program rather than merely his or her placement or classification, will be changed in educationally appropriate ways...[30]

Unfortunately, many learning and emotional difficulties are functional and contextual in nature and must be disagnosed by professionals examining individual cases. The invocation of general legal thus has only limited usefulness. Many of the categorical definitions of handicap are largely illusory,[31] and have cures that are not readily identifiable or which are in dispute.

The constantly changing state of the art in special education makes it quite possible that the evolution of the field will outpace the ability of the courts to modify their reform decree accordingly. Moreover, the very process of labelling a student as possessing a certain handicap may aggravate his condition (Richard Weatherly points out that teachers have different expectations of labelled children than for children they believe not to possess a handicap.)[32] Often the

services a student receives are less important than where he acquires them and in which educational environment, and in the correct environment a child's handicap may disappear.

This inappropriate fit between legalism and special education professionalism leads to the problems that were evident in our two special education case studies. Judges trying to determine compliance usually will rely on quantifiable measures of class enrollments, educational offerings and the like, but in reality those measures say very little. In New York City this difficulty has contributed to the recycling of many students through the special education system, as misdiagnosis has led to placement in inappropriate classes and to futher referral for evaluation once the improper placement has been discovered.

In Pennsylvania the triumph of legalism has been more complete. There the role of the special educator has diminished considerably in the past decade, due to the growth of legalism. Debate in the courtroom has focused in that state not act on professional issues such as curriculum and staffing matters, but on issues whose outcomes can be measured such as whether organizations have changed their procedures. In both case studies data on the the success of the reform litigation indicates that substantial progress has been made in terms of the numbers of students enrolled and classes offered. But these fugures indicate far less than it may at first seem.

In prison reform cases a professional culture is absent. The custodial orientation of most penal institutions means that issues of inmate rehabilitation, which is the issue area's most vexing

professional issue, have little operational significance for a court seeking reform. Court reform decrees order that better sanitary conditions be provided, that guard behavior change, or that prisoners be served better food. There is little concern with the application of a technical body of knowledge to an individual's needs. This absence of a professional culture on penal issues indicates that changes in jails can more easily be achieved and that measures of change will more accurately reflect imporovement in services. It also suggests that institutional reform in an issue area where there is a dominant group of professionals will be problematic or difficult.

IV. Environmental Factors

The impact of the reform suits in all four of our case studies: on special education reform in Pennsylvania and New York City, on jail and prison reform in New York City and Rhode Island, was affected by social, political and other contextual factors external to the immediate focus of the litigation. Overcrowding caused compliance difficulties in the two jails cases, while a lack of money frustrated compliance in the special education cases. These factors display quite vividly the difficulty of achieving complete compliance with a court's reform decree.

Courts seeking to improve public services cannot anticipate many of the problems that impede their reform efforts, problems that are beyond the authority of the court to address. The jail overcrowding that is now so pervasive a phenomenon has done much to frustrate the compliance with court orders in Rhode Island and New York City. This overcrowding

was in large part due to the rise in the crime rate, changing sentencing patterns, and other factors which cannot be affected by a lawsuit.

Political factors external to the immediate focus of the litigation also can hinder compliance. Paying for the added costs of improvements in a jail system, or the costs that accompany the expansion of special education programs, require the support of elected officals in the statehouse or in city hall. This support is often difficult to enlist because the very fact of judicial intervention in social services is a highly political act that usually engenders opposition from political leaders. A judge seeking to reform a public institution must be a sensitive to the political role that he plays when he presides over such suits.

Bureaucratic environmental concerns also can make compliance difficult. The process of changing public services sometimes requires the cooperation of many public agencies, not just those that are defendants in a reform suit, and difficulties in coordinating the operations of these agencies can prove to be formidable. Improving the special education offerings of the public schools in New York City required the expansion of the school buildings in many of those areas, and that could only be accomplished by resort to the lengthy bidding procedures that must take place before new public construction in that city can begin. Judge Pettine in Rhode Island faced the same construction problems with regard to the Adult Correctional Institutions in Cranston, as did Judge Frankel concerning the New York City jails. Successful implementation of the PARC mandate in Pennsylvania required

substantial changes in the way that local school districts in the commonwealth addressed the needs of their handicapped children--changes that necessitated the hiring and training of new staff, as well as enlisting the cooperation of "regular" education personnel.

The press, one environmental element that often plays a major role in institutional reform, sometimes is quite helpful. In all four of our case studies, the widespread publicity that accompanied the intervention of the courts in the issue area helped raise public awareness of the need for change. In the two special education cases the pressation greatly assisted the court in enlisting the help of the elected political leaders for institutional reform. In the two special education cases the media salience that the filing of a lawsuit gave to the needs of the handicapped did more to place the issue on the public agenda than anything else. Unfortunately, publicity does little to help the court cope with the difficulties posed by the other factors we have discussed. After the initial entry of a reform decree, press coverage of the suit tends to be sporadic, and the coverage of the more intractable impediments to reform, such as the inattention to the role of the street level bureaucrat, is meager.

This shifting influence of the environment on a judge's reform regime argues for a lowering of expectations about what such suits can achieve, and for a sober realization that a reform regime, no matter how carefully devised, may fall afoul of factors that are beyond the reach of the court. In both special education and jail reform, change was be less than complete. Several factors conspire to frustrate attempts to

improve public services: the allocation of costs and benefits of the proposed change, the realities of the public bureaucracy, the presence of a professional culture, and external factors beyond anyone's control.

VIII. Conclusion: Do Court Reform Decisions Make a Difference?

The making of policy by courts seeking to reform public institutions occurs in three analytically distinct stages: an issue is first placed on the public agenda. A decision about that issue is then reached. Finally, the decision is implemented.[1]

The decision to go to court to seek institutional reform placed the issues of penal reform or special education on the public agenda. Suits were filed by the PARC group only after the retarded had been excluded from education for many years. The ensuing consent decree forced the commonwealth of Pennsylvania to try to meet the educational needs of the retarded. The Jose P. plaintiffs in New York City tried court action to eliminate the waiting lists for educational services. After a decade of resisting, New York City finally attempted to eliminate the waiting lists. The ACI prison lawsuits forced corrections officials in Rhode Island to make improvements in an institution described by Judge Raymond Pettine as the only prison he had ever visited about which he had nothing good to say. The lawsuits concerning conditions in the Tombs, and later, all the New York City houses of detention, undoubtedly led to efforts the city of New York to ameliorate conditions in those institutions.

The filing of a lawsuit, of course, is not the only way that citizens can expand the agenda or influence the adoption of new programs. Powerful interest groups may exert political pressure or the opinions of political elites may change. A crisis such as widespread inmate rioting may occur.[2] But one of the unique characteristics of court involvement in public policy is the opportunity it presents to

individual litigants or to public interest lawyers claiming to represent minorities for shaping the political agenda.[4] These groups need not pay the onerous costs of attend intensive legislative lobbying campaigns. The plaintiffs do not have to develop the cohesiveness that is a prerequisite for success when help is sought from legislatures or administrative agencies.

The courts also are policy decisionmakers. As can be seen from all four case studies, the remedies entered by the federal judges specify what levels of service will pass constitutional muster. The remedies set standards about prison cleanliness, programs and inmate classification. They ordered that certain special education classes be offered and they revised evaluation and placement procedures. They decreed that certain procedural guarantees be observed when prison guards police inmates in the jails.

The judges in all four case studies sought to make decisions about both both substantive outcomes and organizational procedures. The substantive decisions included ordering that certain types of special education programs be provided, that jails be cleaned up, or that they give each inmate more cell space. The procedural orders included the provision of due process guarantees for handicapped children in the schools, the extension of guarantees to jail inmates on disciplinary and mail issues, and orders that required defendants file timely compliance reports with the court. The courts were successful in raising the most grossly deficient levels of service. They also were successful in

changing through rule those administrative practices that could be changed by organizational executives.

Courts can implement public policy. They do this when they directly supervise the delivery of educational services or the administration of prison systems. They also implement policy when supervising the operations of public agencies as they put into operation the reform decree.

Courts try to implement policy both directly, by holding hearings on problems that arise, and indirectly, by appointing surrogate mediators such as Special Masters. In three of the four case studies the court appointed a master to monitor or enforce its remedy. In the fourth institutional reform case, the jail litigation in New York City, the federal court preferred to rely on the plaintiffs' attorneys to monitor implementation.

Court involvement in policymaking also has other important characteristics, for this separation of court policymaking into three distinct stages is somewhat artificial. For the courts, as with other institutions, policy decisionmaking and policy implementation are almost always intertwined. When courts retain jurisdiction in an institutional reform case, they often continue to formulate policy as it is implemented. The reform decree is modified by the court to meet any exigencies that arise, and new problems are brought to the courthouse by litigants as they come to perceive the court as a forum where redress can be had for their grievances.

The Constitution does not distinguish between the attainment of certain constitutional minima in public services and the achievement of a more perfect, but more elusive level of services that may be beyond the capacity of any social system to provide. The legal confusion that results from this uncertainty is predictable: in all four case studies the courts became bogged down for years in implementation controversies and apparently endless wrangling over policy problems as they sought to secure compliance. Old reform suits never seem to die; they often do not even fade away. The involvement of the court in each of these four case studies has continued for a decade and shoes no signs of ending.

Other factors contribute to the extreme length of institutional reform litigation. There are no accepted rules for court disengagement in institutional reform litigation. Procedures governing the initiation of class action suits, for gathering and presenting evidence, and even for appointing special masters have some guiding principles. But there is little in the evolving forms of public law litigation which guide inform a judge seeking to determine when the control of a public institution should be returned to those elected or appointed to run it.

Compliance, measured by conventional standards of the law, is never as complete as initially anticipated, and the resulting changes often take unanticipated dircetions. A considerable amount of judicial time is spent "adjusting and readjusting, allocating and reallocating"[3] the many aspects of court involvement in the suit. The court may find that the original remedy did not take into account all the important facts, or that its orders need to be modified in light of changed facts.

Parties to the suit may bring new problems to the court which were beyond the scope of the original lawsuit. The court is dragged ever deeper oversight of the public agencies. Delays in meeting renovation deadlines for jail improvements, for example, can cause a judge to investigate delays in those areas of city government responsible for construction, and, in turn, to scrutinize the bidding process for city contracts. These entanglements greatly lengthen the implementation stage of the lawsuit.

This tendency for the courts to enlarge and prolong both the domain of their influence and length of their involvement is due to the "tar-baby effect" that occurs whenever any government body--not just the courts--seeks to govern the behavior of another enterprise.[4] The regulating organization gets bogged down in correcting unforseen mistakes or consequences, in trying to regulate additional aspects of the enterprise to insure that the initial rule "comes out right". Its involvement is deepened.

The "tar baby" phenomenon occurred in each of our case studies. Improving the conditions of confinement at the Adult Correctional Institution in Cranston, Rhode Island meant that Judge Pettine had to supervise the details of jail construction in that state; insuring the educational "appropriateness" guaranteed by the PARC consent decree meant that Federal Judge Becker investigated the transportation system that brought handicapped children to school, and listened to parent complaints that the buses in Philadelphia were always late. Judge Nickerson in New York City explicitly made reference to the

"polycentric" nature of the special education problems raised by the Jose P. suits, and appointed a Special Master with experience in school litigation to attend to these scores of problems that case engendered. There, too, Judge Frankel was forced to range widely on special education issues.

Still another reason for the prolonged court involvement in institutional reform suits is that people affected by the litigation come to perceive the court as a forum where any problems relating to the public agency under investigation can be brought. Parents of special education children complain to the court about all aspects of handicapped education--from the monumental to the trivial. Lawyers in jail cases complain about issues that were not part of the original conditions of confinement suits. Legal advocacy groups quickly became important participants in policymaking "Often attorneys from [The National Prison Project] know as much about a prison as the officials do", said one observer of prison reform suits.

The court's role in the policies and politics of institutional reform has evolved in all four of the cases examined. The issues raised by plaintiffs were initially narrow. In Rhode Island, the first concern of the courts and plaintiffs was with extending due process protections to ACI inmates; only later did the case blossom into a full legal challenge to the prison system in that state. In New York City, the Tombs controversy began as a protest by inmates of conditions in the Manhattan House of Detention; by the end of the decade the federal courts were scrutinizing the operations of all the New York City jails.

Similarly, the PARC controversy in Pennsylvania first concerned the demand of the severely handicapped for an education, but by 1980, the courts had expanded their concern to every category of handicapped, gifted and talented children. The Jose P. litigation commenced as a challenge to the existence of waiting lists for children desiring educational services; later it became a broader legal challenge to New York City's special education system.

This evolutionary character of court involvement in the reform of public institutions indicates that most judges are wary of becoming too meddlesome in the workings of administrative agencies. In these case studies, the judges were enlisted in the detailed operations of those agencies only after the continued unwillingness of public administrators to make improvements in services became evident and systemwide reform suits were filed.

The Future of Reform Litigation

The "long summer" of social reform that occurred after midcentury, is now drawing to a close in courts, as elsewhere, [5] Recent pronouncements of the Supreme Court and several critical studies of the role of the courts in public law litigation indicate that there is considerable sentiment that is less than hospitable to institutional reform lawsuits.

Yet the courts are unlikely to abandon completely this kind of involvement in public policy. The public law trend not only reflects

the ideology of a particular generation of federal judges but also a more pervasive change in the way we think about the political system and the role the law plays within it. The use of the legal system to reform public services followed the growth of the welfare state. As the federal government reallocated public benefits for special populations, the legal system, long the means of settling public controversies, was modified to handle disputes concerning these new claims. Forcing the courts to give their role as in social services would require a "transformatiom of the underlying political and legal culture as vast as that by which it was intially produced. The Supreme Court can contribute to such a transformation over time but cannot accomplish it."[6] Only if government stopped following distributive and redistributive public policies and the people ceased organizing themselves into political groups based on racial, ethnic or social lines could this cake place..

The usefulness of this judicial activity is that it provides one way of controlling the bureaucracy. It exercises an oversight function on behalf of interest groups and those affected by the bureaucracies. Even the political branches have been wrestling with these problems of bureaucratic control.

But if this type of court involvement in policymaking is to be defended, it must be done in ways that destroy the institutional myths that its supporters rely upon to support reform litigation: that courts respond to the demands of actual minority groups, not their lawyers, and that substantive legal rights are somehow different enough from other

government entitlements that discussions of their merits cannot proceed along the lines of normal political discourse. Attempting to find legal fault, as understood in private litigation, is foolish when government action is so dependent on the coordinated activity of a a large number of public organizations at all levels, each with personnel subject to a variety of pressures and each working for many different motives. And calling a distributive or redistributive policy a "remedy" does little to help the public official cope with the complexities that accompany the task of implementing it. Courts are as susceptible to interest group lobbying, albeit, a distinctive form, as are bureaucracies and some judicial norms are very inappropriate for administering public services.

The four case studies show that judicial reform does some good. And some not so good. But whether the end is good or ill, the courts often behave in these suits much like the unaccountable bureaucracies they are called upon to reform. What is unfortunate is that our political system provides little opportunity for the average citizen to say which he prefers.

FOOTNOTES

Chapter 1

1. N. Glazer, "Should Judges Administer Social Services?", The Public Interest, No. 50, Winter 1978, p. 64. See also, A. Chayes, "The Role of the Judge in Public Law Litigation", Harvard Law Review vol. 89, p. 1281 (May 1976).

2. The Federalist, No. 78.,(Earle ed.), p.504.

3. The literature on these issues is voluminous. See, P. Baude, The Federal Courts and Prison Reform, Indiana Law Journal , vol. 52, p. 770 (1976); T. Eisenberg and S..C. Yeazell, "The Ordinary and Extraordinary in Institutional Reform Litigation", Harvard Law Review, vol. 93, 495 (1980); R.F. Nagel, "Separation of Powers and the Scope of Federal Equitable Remedies", Stanford Law Review, vol. 30, 661 (1978); D.P. Moynihan, "Imperial Government", Commentary, June 1978, p.25; R. Berger, Government by Judiciary, (Cambridge: Harvard University Press, 1977). N. Glazer, "Toward an Imperial Judiciary?", The Public Interest, No. 41, p. 106, 1975,; A. Cox, The Role of the Supreme Court in American Government, (New York: Oxford University Press, 1976); F. Johnson, "The Constitution and

the Federal District Judge", Texas Law Review,vol. 54, p.903 (1976); M.A. Rebell and A.R. Block, Educational Policy-Making and the Courts: An Empirical Study of the Effectiveness and Legitimacy of Judicial Activism, (Chicago: University of Chicago Press, 1982.) H. Wechsler, "Toward Neutral Principles of Constitutional Law", Harvard Law Review vol. 73, p. 1, (1959), p. 19. R. Bork, "Neutral Principles and Some First Amendment Problems", 47 Indiana Law Review 1 (1971), p.18.

At least one author has linked the new judicial, activism to the decline in the legitimacy of the family and community institutions: M.A. Rebell, "Judicial Activism and the Court's New Role", Social Policy, Spring 1982, p.24.

4. J. Frank, "What the Courts Do in Fact", Illinois Law Review, vol. 26, 651, 653 (1932).

5. See, for example, G. Allison, Essence of Decision (Boston: Little, Brown & Co., 1971); E. Bardach, The Implementation Game: What Happens After a Bill Becomes Law (Cambridge.: MIT Press, 1977); D.S. Van Meter and Carl E. Van Horn, "The Policy Implementation Process: A Conceptual Framework," Administration and Society, vol 6, (February 1975), vol. 6, Chapter 2

1. Kansas Constitution, Art. 6, Sec.1.

2. Ibid., Sec. 5.

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The plaintiffs legal strategy was dictated in part by the size of the city's corrections effort. The boroughs of Manhattan and the Bronx lie in New York's Southern Federal Court District. Staten Island, Queens and Brooklyn lie in the Eastern District. Thus, suits attacking the conditions in all the city's houses of detention would have to be filed in two different federal jurisdicitions, an enormous and costly enterprise.

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